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Attorney

A  
R E P O R T  
/ OF  
S O M E P R O C E E D I N G S  
ON THE  
C O M M I S S I O N  
FOR THE  
TRIAL OF THE REBELS IN THE YEAR 1746,  
IN THE COUNTY OF SURRY,  
AND OF OTHER  
C R O W N C A S E S :

TO WHICH ARE ADDED  
DISCOURSES UPON A FEW BRANCHES  
OF THE  
C R O W N L A W :

---

By SIR MICHAEL FOSTER, Knt.  
Sometime ~~One~~ of the Judges of the Court of King's Bench, and Recorder  
of the City of Bristol.

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THE THIRD EDITION,  
WITH AN APPENDIX CONTAINING NEW CASES.

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With Additional NOTES and REFERENCES by his Nephew,  
MICHAEL DODSON, Esq; BARRISTER AT LAW.

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# P R E F A C E

TO THE

## T H I R D E D I T I O N .

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**I** HAVE added in this edition three new cases, which the learned author intended to insert in the first edition, and had caused to be transcribed for that purpose. Two of them are the cases of *John Midwinter* and *Richard Sims* on the statute 9 Geo. I. c. 22, and of *John Bell* on the statute 8 and 9 W. III. c. 26, and the third is an anonymous case on the statute 9 & 10 W. III. c. 41. In the two former cases he differed from most of the judges, and they were omitted by him in consequence of the advice of friends.

The case of *Midwinter* and *Sims* is of great importance and very extensive influence; and as it is imperfectly stated in the case of *Rex v. John Royce* in B. R. 1767, reported in 4 Bur-

## PREFACE TO THE

row 2073—2086, I think it right to take this opportunity of communicating it to the world. The question in that case was, Whether *Sims*, who was present aiding and abetting *Midwinter* in killing a mare of the prosecutor, was ousted of the benefit of clergy by the statute 9 Geo. I. c. 22, by which it is enacted, "That if any person or persons shall unlawfully and maliciously kill, maim or wound any cattle, every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death, as in cases of felony, without benefit of clergy." Mr. Justice *Foster* thought, that *Sims* was a felon, and a principal felon, but that, as aiders and abettors are not named, nor described in the statute, and the law requires statutes so penal to be construed *literally* and *strictly*, he was not excluded from the benefit of clergy. The other judges thought him to be excluded; and some later judges have agreed with them: but the argument of Mr. Justice *Foster*, whom Sir *William Blackstone* \* justly styles a very great master of the crown-law, and who, as Lord Chief-Justice *De Grey* † upon an important occasion said, may be truly called the *Magna Charta* of liberty of persons as well as fortunes, amounts, in my opinion, to a demonstration,

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\* See Comment. IV. chap. 1. p. 2.

† See 3 Wilton 203.

that

### THIRD EDITION.

that all those learned judges have mistaken the law. *Sims* might deserve as severe a punishment as *Midwinter*; but no punishment which is not authorized by law ought to be inflicted on any man, and the point is, Whether the law in this case hath provided the same punishment for both. Mr. Justice *Blackstone* \*, it is material here to observe, adopts the distinctions which Mr. Justice *Foster* endeavours to establish, and he lays down these rules; " That when the benefit of clergy is taken away from the offence, (as in case of murder, buggery, robbery, rape and burglary,) a principal in the second degree, aiding and abetting the crime, is as well excluded from his clergy as he that is principal in the first degree: but that where it is only taken away from the person committing the offence, (as in the case of stabbing, or committing larceny in a dwelling-house, or privately from the person,) his aiders and abettors are not excluded; THROUGH THE TENDERNESS OF THE LAW, WHICH HATH DETERMINED, THAT SUCH STATUTES SHALL BE TAKEN LITERALLY †."

In the above-mentioned case of *Royce*, who was indicted with others on the statute 1 Geo. I. st. 2. c. 5. for beginning to demolish and pull down a dwelling-house, I have not the least

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\* Comment. IV. chap. 28. § 3.

† 1 Hale P. C. 529. *Foster* 356.

doubt but that the court rightly determined, that although he only joined with, and encouraged and abetted other persons in beginning to demolish and pull down the dwelling-house, yet that he was guilty of a capital offence; for the fourth section of the statute enacts, "That if any persons unlawfully, riotously and tumultuously assembled together, to the disturbance of the publick peace, shall unlawfully and with force demolish or pull down, or begin to demolish or pull down — any dwelling-house —, every such demolishing or pulling down, or beginning to demolish or pull down, shall be adjudged felony without benefit of clergy, and THE OFFENDERS THEREIN shall be adjudged felons, and shall suffer death, as in case of felony, without benefit of clergy." The words of this statute are, in the form and manner of expression, remarkably similar to the words in the statute 25 H. VIII. c. 6. against buggery, and exclude from the benefit of clergy, as manifestly as that statute, persons present aiding and abetting.

See p. 358,  
359. 422, 423.

I am sorry, that I cannot entertain so favourable an opinion of the case of *The Coal-beavers*, which is inserted in Mr. *Leach's Cases in Crown-Law*, p. 61—63. Seven men were indicted on the statute 9 Geo. I. c. 22, being the same statute on which *Midwinter* and *Sims* were indicted, for shooting at *John Green* in his dwelling-house, and were tried at the *Old Bailey* in 1768. Three

of them were proved to have been present when the others fired, but they had not been seen to use any fire-arms themselves. The jury found them all guilty, and the judges \*, on a reference to them, determined, that the offence of all was capital; and they were all executed. The words of the statute are; " If any person or persons shall wilfully and maliciously shoot at any person in any dwelling-house, or other place, every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death, as in cases of felony, without benefit of clergy." This case is exactly similar to the case of *Midwinter* and *Sims*; and if Mr. Justice *Foster's* opinion in that case be well founded, namely, that the benefit of clergy is taken away only from persons *actually* committing the offence, it follows necessarily, that three of those men suffered a more severe punishment than the law authorizeth.

The reader will perceive, that many of the reasons and authorities on which the author relies are woven into his Discourse on Accomplices, and will excuse the repetition, as great injury would be done to the argument by omitting the parts inserted in that Discourse.

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\* Sir Michael Foster and Sir William Blackstone were not judges at this time. The former died Nov. 7, 1763, and the latter was made a judge in 1770.

## P R E F A C E   T O   T H E

The second case added in this edition is the case of *John Bell*, who was tried at the *Old Bailey* in 1753, on an indictment for high treason grounded on the statute 8 & 9 *W. III. c. 26*, for having in his custody a press for coinage without any lawful authority or sufficient excuse, and was convicted. On a reference to the judges two questions were made, on the first of which Lord Chief-Justice *Ryder* differed from Mr. Justice *Foster* and the other judges, and on the second he and Mr. Justice *Foster* concurred in opinion against the others. This case was omitted by the advice of Lord *Hardwicke*; and in the margin of the copy intended for the printer the author hath written this note: "I am satisfied, that the chief-justice upon the first question, and the other judges upon the second, were totally mistaken. A great man formerly of the profession, by whose advice the case is omitted, told me, that he hath no doubt upon either of the questions. I believe, that his advice proceeded from a regard to the judges, or from his fear of establishing a bad precedent by the authority of great names, though he did not explain himself fully upon that head." The case is shortly mentioned by Lord *Mansfield* in 1 *Burrow* 154. "In indictments, saith he, upon 8, 9 *W. III. c. 26*. for having a coining-press, every thing which shews, that the defendant had no authority must be negatively set out: and so  
it



it was done in the indictment of *Bell*, which was lately argued before all the judges." I have no recollection, that the opinions of the judges in this case are reported in any book : and therefore as the points are of real importance, and it is still possible, that a less accurate account may be published, and especially as I received directions from the author about publishing it at a proper time, I am unwilling to omit the present opportunity of doing it.

The last of the new cases is an anonymous one of a woman, who was indicted on the statute 7 & 8 W. III. c. 41. for having in her custody divers pieces of canvas marked with the King's mark, she not being a person employed to make canvas for the King's use. This case hath some connection with *Bell's*, and was omitted in consequence of the omission of that case. It is of some importance, and ought now to accompany the case of *Bell*.

*Boswell Court,*  
*July 20, 1792.*

M. DODSON.

PRE-



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P R E F A C E

TO THE

S E C O N D E D I T I O N .

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I HOPE, that this edition of Sir *Michael Foster's* Report, and Discourses on the Crown-Law, will be found to be very correct. I have used great diligence for that purpose; and have been considerably assisted by the printed copy which the learned author used, and which he hath very carefully corrected. His corrections indeed relate principally to the punctuation, and to slight inaccuracies in the stile; but these matters deserve to be regarded in so valuable a work. In pages 295 and 363 the reader will find some few words inclosed between hooks, which were added by the author. Some additional notes and references I have made in the margin, which will, I hope, be found to be an improvement to the work. However, that no injury may thereby be done  
to

## P R E F A C E   T O   T H E

to the author, the additions are constantly distinguished as such, unless they are merely designed to complete references which were before made.

It was a defect in the former edition of the argument in defence of the practice of pressing mariners for the publick service, that most of the precedents cited from *Rymer's Fœdera* were cited only by the years of the respective Kings, and not, as they ought also to have been, by the pages of the respective volumes. This defect is in this edition supplied, and references are also made to many authorities in *Rymer*, which are omitted by the learned author. In referring to *Rymer*, I use, as he did, the second edition.

Mr. *Barrington*, in his Observations on the more ancient statutes, p. 335, 336, seems to blame the author for not printing, together with his argument, the records cited by him from *Rymer*; “as, saith he, an abridgment often “*mistates* or *misleads*, and few will take the “trouble to examine the original.” If those records had remained in the Tower unpublished, such a method of proceeding would certainly have been very proper; but as they have been long in print, and copies of them are in many hands, I see no necessity for printing at length all the records which it was proper to cite: and I believe, that, as in this case the abridgment was made by a person of so much learning

learning and integrity, few readers would be under any apprehension of finding the records mistated in such a manner as to mislead. "In the first order, saith Mr. *Barrington*, which is cited, the most material part perhaps to prove the power of pressing is not stated." And after stating the abridgment of the commission to *William Barret* in the 29th of *Edw. III.*, he adds, "That upon examining the original in *Rymer* after this follows; Et ad omnes quos in hac parte contrarios invenerit seu rebelles capiendum et in prisonis nostris mancipandum, in eisdem moraturos quousque de eisdem aliter duxerimus demandandum." This is certainly a material part of the commission: but I cannot agree with this Gentleman in thinking, that it is the most material part to prove the power of pressing; for if the commission had been originally drawn without these words, it would have been almost as strong a proof of the point for which it was cited, that is, the usage. However it is a circumstance proper to be known; and I can add, that the like power is given by many other commissions in *Rymer*.

Mr. *Barrington* hath made objections to some other passages in this very learned and accurate work; and as they appear to me not to be well founded, I think it right to take this opportunity of making some remarks upon them. I will take them in the order in which they lye in the fourth edition of his book.

In

In p. 32. Note (k) he is pleased to say,  
 " That it seems to be a very extraordinary con-  
 " struction of the statute of *William III*, which  
 " is rather insinuated than contended for by Mr.  
 " Justice *Foster* in his Treatise on Treason, that  
 " the Spiritual Lords need not be summoned  
 " under the words, *All* who have a right to sit  
 " and vote in Parliament; which I apprehend,  
 " saith he, to have meant only the making it  
 " unnecessary to summon Peers who were mi-  
 " nors or professed papists." If Mr. Justice  
*Foster* had contended or insinuated, that the  
 Spiritual Lords are not included under the  
 words, " All who have a right to sit and vote  
 " in Parliament," he would deserve Mr. *Barrington's*  
 censure: but it happens, that he hath  
 neither contended for nor insinuated any such  
 thing; for Mr. *Barrington*, by omitting in one  
 part of his note, and changing in another, a  
 word which hath great influence in the con-  
 struction of the statute, and by his total silence  
 in respect to the proviso hereafter cited, hath  
 been guilty, in a remarkable manner, of MIS-  
 TATING; but whether his design in so doing  
 was to MISLEAD, I leave to the judgment of  
 others. The statute doth not direct, as he asserts,  
 all the *Lords* to be summoned, but all the  
 PEERS, who have a right to sit and vote in  
 Parliament; and Mr. Justice *Foster* thought,  
 that the Spiritual Lords are not included under  
 this

See Disc. T. C. 3.  
 f. 10.

this description, being of opinion that they are not Peers, though they are Lords of Parliament. He likewise thought, that as the Lords *Kilmarnock*, *Cromartie* and *Babnering* were tried in the court of the Lord the King in Parliament, and not in the court of the Lord High-Steward; and as the statute of 7 *W. III. c. 3. §. 12.* provides, "That neither that act, nor any thing therein contained shall any way extend, or be construed to extend to any impeachment, OR OTHER PROCEEDINGS IN PARLIAMENT IN ANY KIND WHATSOEVER," it was as unnecessary to summon the Peers as the Spiritual Lords. This opinion he hath strongly intimated, not only in the passage to which Mr. *Barrington* refers, but also in his report of Lord *Ferrers's* case, p. 148—150: and I believe, that all who will carefully examine the subject will be convinced, that, in point of law, those Lords were no more intitled to the benefit of the statute of *K. William*, than Lord *Lovat*, who was tried upon an impeachment, was.

When Mr. *Barrington* shall have re-considered the subject, Mr. Justice *Foster's* construction of the statute will not perhaps appear extraordinary to him: perhaps indeed it may appear to him more extraordinary, that a very different construction was put upon it by the three learned judges (Sir *William Lee*, Sir *John Willes* and Sir *Thomas Parker*) who attended the

See 3 Inst. 309,  
31. 4 Black.  
c. 19.

See the Pro-  
ceedings in  
print, p. 1, 2.

the committee of the House of Lords in the case of Lord *Kilmarnock* and others.

In p. 56. note (d) having mentioned *Egan* and *Salmon*, who on the 8th of *March* 1756 stood in the pillory, Mr. *Barrington* observes, “ That  
“ the offence of these criminals was undoubt-  
“ edly of the most atrocious nature; nor do I  
“ see, saith he, why they might not have been  
“ indicted for murder, notwithstanding Mr. Jus-  
“ tice *Foster* hath in his Reports, p. 132, inti-  
“ mated his opinion, that such an indictment  
“ would not lye, and chiefly because there is no  
“ such precedent.” As to this observation, I  
have only to remark, that Mr. Justice *Foster*’s  
opinion in relation to *Macdaniel*, *Berry* and  
*Jones*, (for Mr. *Barrington* mistakes in suppos-  
ing, that there was any foundation for indicting  
*Egan* and *Salmon* of murder,) is strongly sup-  
ported by Sir *Edward Coke*, who informs us  
(3 *Inst.* 48.), That to procure the death of an  
innocent person by giving false evidence against  
him was not holden for murder in his time.

In p. 487. Mr. *Barrington* arraigns the deci-  
sion in the case of *John Howard*, which is re-  
ported by Mr. Justice *Foster* in p. 77, 78.  
*Howard* was indicted at the *Old Bailey* on the  
statute of 10 & 11 *W. III. c. 23.* for privately  
stealing goods in a warehouse. The judges pre-  
sent were of opinion, that by the word *warehouses*  
in the statute are meant, not mere repositories



for goods, but such places where merchants and other traders keep their goods for sale in the nature of shops, and whither customers go to view them. But it seems to Mr. *Barrington*, "That distant warehouses were those which were particularly intended to be protected by the statute, as the statute 3 *W. III. c. 9.* expressly extended to shops or warehouses adjoining to dwelling-houses." The force of this argument I take to consist in this, that unless distant warehouses are considered as intended by the statute of the 10th and 11th of K. *William*, this statute hath no effect, as the former statute provides for warehouses adjoining to dwelling-houses. But this is far from being the case; for the statute of 10 & 11 *W. III.* takes away the benefit of clergy from a person *privately* stealing in a warehouse to the value of 5 s, whereas the former statute had taken away clergy only in the case of *breaking* the warehouse and stealing therein to that value. And a strong argument, in confirmation of the opinion of the judges in *Howard's* case, may be drawn from the preamble of the statute on which he was indicted. It recites, that the crime of stealing goods privately out of *shops and warehouses*, commonly called SHOPLIFTING, was of late years much increased; and from this manner of expression it seems to follow clearly, that the warehouses intended by

the act are such, and such only, as are used in the nature of shops.

P. 68, 69.

I come now to Mr. *Barrington's* last objection. Having in p. 524 cited the 13th section of the statute of 1 *Edw. VI. c. 12*, by which it is enacted, That all wilful killing by poisoning — shall be adjudged wilful murder of malice prepensed, he adds, “What could have been the  
“ occasion of this very extraordinary clause must  
“ naturally be asked by every one who reads it.  
“ Mr. Justice *Foster* in his Reports hath taken  
“ notice of the different opinions of *Coke*, *Kelyng*  
“ and *Holt* on this part of the law, with none  
“ of which he appears to be satisfied, *though it*  
“ *should seem to be doubtful whether his own*  
“ *solution of the difficulty may have been more*  
“ *happy.*” I have carefully considered what Mr. *Barrington* hath advanced on this subject, and must say, that the solution proposed by Mr. Justice *Foster* appears to me not only to be more happy than those proposed by *Coke*, *Kelyng* and *Holt*, and by Mr. *Barrington*, but to be a clear and satisfactory solution of the difficulty. Mr. *Barrington* asks, Whether killing by poison did not continue a murder by the common-law after the repeal of the statute of *Henry VIII*, which had made it high treason? And whether if a misdemeanour be made a felony by a statute, which is afterwards repealed, it doth not continue a misdemeanour

demeanour as before? The answers which Mr. *Barrington* would give to these questions are, I doubt not, the true answers. But the great question remains; Whether, after the repeal of the statute of *Henry VIII*, killing by poison would have been ousted of clergy, if no express provision had been made for that purpose, the benefit of clergy having been taken from murder while killing by poison was not murder, but high treason? Mr. Justice *Foster* was of opinion, that it would not have been ousted of clergy, and he hath supported his opinion in a masterly manner; and I conceive, that the judges in the reign of *Q. Anne* determined upon like grounds, that, though by the statute of 31 *Eliz. c. 12.* accessaries after the fact in horse-stealing are ousted of clergy, yet that a person knowingly receiving a stolen horse, who by subsequent statutes is made an accessary after the fact, is not ousted, such receiver not being an accessary in the time of *Q. Elizabeth*, and the benefit of clergy not being taken from him by the statutes which make him an accessary. See *Disc. III. c. 3. §. 5.*

Having made these short remarks on Mr. *Barrington's* unmerited reflections, I will add, that I wish, as the learned author wished, that every mistake in his book may be discovered: and I will conclude this preface with pointing out a mistake, which he would certainly have corrected, if it had been observed before his

death. In his last Discourse p. 397, he represents Sir *Matthew Hale* as supposing, that Sir *Ralph Grey* was punished in the time of *Edward IV.* for treasons committed against *Henry VI. in aid of Edward.* But Sir *Matthew Hale* doth not make this supposition. His supposition is, that Sir *Ralph* was punished in the time of *Edward* as well for treasons committed against *Henry* as against *Edward*; but not that the treasons against *Henry* were committed *in aid of Edward.*

This must be admitted to be a mistake; but it ought, at the same time, to be observed, that it is a mistake of no consequence to the argument; it amounting to no more than this, that Sir *Matthew Hale* is not guilty of a mistake, which Sir *Michael Foster* hath imputed to him.

M. D O D S O N.

*Clifford's Inn,*  
April 9, 1776.

P R E-

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P R E F A C E

TO THE

FIRST EDITION.

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**I** NOW submit to publick censure a report of a few Crown Cafes, which, for the most part, have fallen within my own observation, and in which I have taken some share. What other notes I have taken merely for my own use are too crude and imperfect to admit of a publication; and as I have neither leisure nor inclination to revise them, they will never see the light.

I have in this Report taken a larger scope, and entered more fully into the state of many of the cases and the reasoning on them, than most of my contemporaries have done; and this hath sometimes drawn me into a greater length than they have allowed to themselves. Brevity I have endeavoured to consult, as far as my subject will admit of it: but the affectation of brevity at the expence of perspicuity can answer no valuable purpose.

## P R E F A C E   T O   T H E

Learned men who have employed their time in transmitting to posterity with accuracy, precision and true judgment a history of cases of weight and difficulty falling within their own experience, have been real benefactors to the publick ; and their memory is and ever will be treated with due esteem : but many of the hasty, indigested things called *Reports of Adjudged Cases*, not deserving the name of tolerable *abridgments*, stuffed, as they frequently are, with the *obiter* opinions of judges upon the *breaking* of a case, which probably never proceeded beyond one slight argument, — these things and others of the like kind, mere fragments of learning, the rummage of dead men's papers, or the first essays of young authors, have been the bane and scandal of the law considered as a science *founded on principle*. They burden the memory, or possibly may swell the common-place ; but not entering with due precision into the merits of the question, they leave the judgment uninformed, and furnish materials for endless altercation. They are, if I may be allowed the expression, the *ignes fatui* of the profession ; they always bewilder the reader and frequently mislead him.

I have in a few instances taken the liberty of subjoining to the report of the case some observations of my own by way of proof or illustration, and sometimes of censure. I make no  
apology

apology for this freedom. I wish the ablest of our reporters had more frequently taken the same.

In reporting the arguments of counsel or the opinion of the judges, I have not scrupulously followed the stile and method of the speaker. I hope however the reader will do me the justice to believe, that the substance of what was delivered is faithfully reported, but for the most part in my own words. Every defect therefore in point of method or expression, which the reader will meet with, I alone am answerable for; though I flatter myself the learned gentlemen whose sentiments I have delivered in my own stile and method will not often find themselves or their characters greatly wronged in that respect.

The discourses which follow the report were, for the most part, written some years ago at different times; as leisure served or inclination led me in the choice of my subject.

I never intended to travel through a regular system of the crown-law. It is a journey not to be undertaken by any man in a publick employ, and already far advanced in years. I am therefore content to make myself accountable for a few plain discourses upon some of the more interesting branches of that part of the law, and of the most general concernment: I mean such parts of the statute of treasons as I have considered, many I have purposely  
a 4 omitted,

omitted, and the doctrine of homicide in all its branches.

If what I have offered upon these subjects may serve to remind gentlemen of rank and character in the profession, of what their own reading and experience may have suggested, and at the same time to lead young gentlemen into a right method of arranging their ideas, and reducing what they read or hear to the well-known principles of law and sound policy, my end, as far as regards the profession, will be answered.

But I confess my views were carried something farther.

The learning touching these subjects is a matter of great and universal concernment. It merits, for reasons too obvious to be enlarged on, the attention of every man living. For no rank, no elevation in life, and, let me add, no conduct, how circumspect soever, ought to tempt a reasonable man to conclude, that these inquiries do not, nor possibly can, concern him. A moment's cool reflection on the utter instability of human affairs, and the numberless unforeseen events which a day may bring forth, will be sufficient to guard any man, conscious of his own infirmities, against a delusion of this kind. Those therefore whose birth or fortunes have happily placed them above the study of the law, *as a profession*, will not be offended if I presume, that discourses on these subjects, in preference



rence to every other branch of the law, demand *their* attention.

I have, in the prosecution of these subjects, endeavoured rather to ground myself upon principles of law and sound policy than on the bare authority of former writers ; who will frequently be found contradicting each other, *and sometimes themselves.*

I have endeavoured likewise to clear up a few points which have long lain under some obscurity ; and where I differ from authors whose merit I acknowledge, and whose memory I highly value, I always do it with diffidence ; and never without offering my reasons, which are submitted to the judgment of the learned.

The MSS. cited in the following papers, I am satisfied, are genuine. Copies of them are in many hands : and I doubt not the citations will appear to have been faithfully made. If the freedom I have taken with them needeth any apology, they have been of considerable service to me ; they have given me light upon many points, which the printed reports do not afford ; and they are the remains of gentlemen eminent in the profession. For these reasons I was unwilling they should be wholly lost to the publick.

If Chief-Justice *Hale's* health or leisure in the decline of his years had permitted him to revise his History of the Pleas of the Crown, and

to render it as correct as his great abilities would have enabled him ; or perhaps had that valuable work been published as correctly as he left it, I mean from the transcript corrected and improved in great measure with his own hand, (the whole probably under his direction, certainly found among his papers after his death) ; in either of these cases every attempt of this kind might have been judged altogether needless.

See the editor's  
preface, p. xvi.

But the corrected copy, which, the editor tells us, was bound up *in seven small folio volumes*, was TOTALLY laid aside, and the work published from what he calls the author's original MS, comprized *in one thick folio volume* ; in other words, from his *foul draught*. The reasons *given* by the editor for this procedure are too weak to merit a serious answer. An answer however is ready if it be thought necessary.

See Burnet's  
Life of Hale,  
p. 114.

At the time of the learned author's death, when matters were fresh in memory, and when the persons best-acquainted with his MSS. were living, the transcript was certainly considered as the genuine MS. Bishop *Burnet*, who doubtless had his information from those who best-knew, hath placed *the seven volumes* in a catalogue of the author's MSS. published very soon after his death, without the least mention of *the thick folio volume*, which having been transcribed, and the transcript corrected, was probably  
laid

laid aside, as foul draughts after transcription commonly are, unless they are destroyed : which perhaps may be the better way ; for an author must have less sensibility under publick censure than wise and good men generally have, who can be content “ to be sent to his account with “ all his imperfections on his head.”

I hope these short observations on the unkind treatment which the learned judge hath met with from his publisher may serve as my own apology for the present publication.

I intend it likewise as some apology for that truly valuable man : for if the reader hath observed any mistakes, inconsistencies or needless repetitions in the *summary* or *history*, he will do the learned author the justice to remember, that in the outlines of a work of such extent and variety some inaccuracies of this kind are almost unavoidable. These common candour will excuse, since the author's *last thoughts upon the subject have been* SUPPRESSED : and one may venture to say for him, now he cannot speak for himself, that the *summary*, a collection of extracts hastily put together at different times, and in the hurry of a publick employ ; mere hints for private use, though thrown into some method, and, for the most part, placed under proper heads, (as his collections upon every subject generally were,) was never intended for the press nor fitted for it ; and that the history itself

was

was not intended *by him* for publick view in the dress in which it now appeareth.

The observations on certain passages in Lord Chief-Justice *Hale's* works have long lain by me, and possibly in the opinion of some of my readers come out somewhat unseasonably at this juncture. The cause of the pretender seems now to be absolutely given up. I hope in God it is so. But whether the root of bitterness, the principles which gave birth and growth and strength to it, and have been twice within our memory made a pretence for rebellion at seasons very critical,—whether those principles be totally eradicated I know not. These I encounter in that discourse by shewing, that certain historical facts, which the learned judge hath appealed to in support of them, either have no foundation in truth; or, were they true, do not warrant the conclusions drawn from them.

The passages I animadvert upon have been cited with an uncommon degree of triumph, by those who, to say no worse of them, from the dictates of a misguided conscience, have treated the revolution and present establishment as founded in usurpation and rebellion; and they are in every student's hand. Why therefore may not a good subject, be it in season or out of season, caution the younger part of the profession against the prejudices which the name of Lord Chief-Justice *Hale*, a name ever honoured and  
esteemed,

esteemed, may otherwise beget in them? I, for my part, make no apology for the freedom I have taken with the sentiments of an author, whose memory I can love and honour without adopting any of his mistakes upon the subject of government.

It cannot be denied, and I see no reason for making a secret of it, that the learned judge hath in his writings paid no regard to the principles upon which the revolution and present happy establishment are founded. The prevailing opinions of the times in which he received his first impressions might mislead him: and it is not to be wondered at, if the detestable use the Parliament-army made of it's success in the civil war did contribute to fix him in the prejudices of his early days: for in the competition of parties extremes on one side almost universally produce their contraries on the other; and even honest minds are not always secured against the contagion of party-prejudice.

But it matters not with us, whether his opinion was the effect of prejudices early entertained or the result of cool reflection; since the opinion of no man, how great or good soever, is or ought to be the sole standard of truth. He was undoubtedly very great in his profession; and, which raiseth even a great character infinitely higher in point of real merit and just esteem,

# PREFACE TO THE

esteem, he was in every relation of life *a good man*; though the rectitude of his intentions, while under the strong bias of early prejudices, might sometimes betray him into great mistakes\*.

I hope therefore the young gentlemen of the same honourable profession, for whose service those observations are principally intended, will take the writings of the learned judge into their hands, not barely with a just opinion of his great merit, but with an honest resolution to exemplify in their own conduct the valuable parts of his character.

And I flatter myself, that the leisure of a long vacation will not be thought to have been utterly mispent in revising and completing that discourse. It may at least serve to guard young and unexperienced minds against some impressions, which a modest deference to the opinion of so great an author may have made upon them.

M. F O S T E R.

*Serjeant-at-Law,  
Feb. 27. 1762.*

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\* See the Trial of the Witches at St. Edmonds-Bury before him in *March 1664*.

N. B.

N.B. *The reader is desired to take notice, that most of these papers having been written many years ago, and the whole in a manner completed before the accession of his present Majesty, whenever I use the words The late King or words of the like import, I mean King GEORGE the First. I need not after this caution say, that by every expression intended to denote the King upon the throne, I mean his late Majesty.*

*In citing the State Trials, I make use of the edition of 1730 for the 6 first volumes, and that of 1735 for the 7th and 8th.*

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## ADVERTISEMENT,

Published by the AUTHOR very soon after the first Edition came out.

SINCE the publication of this work I have been favoured with the perusal of Lord *Hale's* original MS; all written with his own hand; and also of the transcript bound up in seven small *folio* volumes corrected to near the middle of the third volume by the author himself, as appears by many interlineations and marginal additions, all likewise of his handwriting.

Upon a careful perusal of these MSS, (a task I could not, in my present circumstances, have easily gone through without the assistance of a young gentleman, who, if I do not greatly flatter myself, will in due time make some figure in the profession,) I am satisfied, that I was over-hasty in saying, as I do in my preface, *That the corrected copy was totally laid aside, and the work published*



# V A C A T I O N

A F T E R

T R I N I T Y T E R M, 1746.

**D**URING the rebellion, which began in *Scotland* in the Summer 1745, an act passed empowering his Majesty to issue commissions for trying the rebels in any county of the kingdom, in the same manner as if the treasons had been committed in that county.

Preparatory  
step to the  
trial of rebels.  
19 Geo. II.  
c. 9.

Pursuant to this act, a commission of oyer and terminer, and gaol-delivery, for the county of *Surry*\*, passed the great seal about the latter end of *Trinity* term. It was directed to every privy-counsellor by name, to all the judges, and to some private gentlemen, empowering them, or any three of them, (*quorum un' &c.*) to execute the commission.

The precept was signed by the three chiefs and the three senior judges, and was returnable the 23d day of *June* 1746; which made fifteen days exclusive between the teste and return.

This was ordered on great deliberation and search of precedents.

On that day most of the judges met at *Serjeants-Inn*; and from thence proceeded in order of seniority to the court-house at *Saint Margaret's Hill* in the borough of *Southwark*.

Lord Chief-Justice *Lee* gave the charge; and the grand jury found bills against the Earls of *Kilmarnock* and *Cromartie*, and the Lord *Balmerino*: which bills were soon afterwards removed by *certiorari* into Parliament.

On the two following days bills of indictment were found against thirty-six of the principal rebels taken at *Carlisle*; and against one *David Morgan*, a barrister at law, who was taken in *Staffordshire*.

The prisoners were then brought to the bar and informed that bills were found against them, of which they should soon have copies; and the court adjourned to that day

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\* Another commission of the like kind issued at the same time for *Middlesex*; but there were no proceedings on it.

## THE REPORT.

fe'nnight: and copies of the indictments with the caption were delivered the same day to the prisoners after the court rose.

By this measure the prisoners had copies of their indictments five days before their arraignment, exclusive of that day and of the day copies were delivered, and also exclusive of the intervening *Sunday*. This was done *ex majori cautela*, and in favour of life, *Sunday* not being a day on which the prisoners may be presumed to be advising with counsel and preparing for their defence. It was so done upon the commission which sat the same Summer in the North; and had been done upon a like commission in the North after the rebellion of 1715. But the statute doth not require this caution with regard to *Sunday*, nor is it of absolute necessity; though in cases of life it is best to follow precedents, if the time will allow of it.

July 3d.

Upon the adjournment-day the prisoners were severally arraigned. Three pleaded guilty. The rest pleaded not guilty; and each of them produced an affidavit, to which they were sworn in court, setting forth that a material witness or witnesses (naming the witnesses and the places of their abode) would be wanted for their defence; and their counsel, who had before been assigned them, moved that their trials might be put off for a reasonable time for bringing up their witnesses.

Sir Dudley  
Ryder.

The attorney-general prayed time to consider of the motion; and thereupon the court adjourned to the next day.

In the evening all the judges in town met at Lord Chief-Justice *Lee's* chambers, and agreed that the case of these prisoners differs greatly from the common cases of trials in the circuits, where affidavits of this kind ought *very sparingly* to be admitted. For in circuit-trials the prisoners from the time of their commitment may and ought to be preparing for their defence. The place where they are to be tried is in most cases well known, and they have likewise a reasonable certainty of the time long before the circuits begin.

But in the present case the prisoners are to be tried at a great distance from the places where the treasons were committed; and neither time nor place for their trial can be said to have been certainly fixed till bills of indictment were found against them, and copies delivered to them; from which time it was  
incumbent

incumbent on them to be preparing for their defence and getting their witnesses to town.

And in regard that the affidavits mentioned the witnesses to reside at different distances from town, some in *England*, and others in *Scotland*, it was thought reasonable, that, in fixing the times of trial, regard should be had to the several distances.

Accordingly it was agreed, that with regard to those prisoners whose witnesses reside in *England*, their trials should be \* put off to the 15th of *July*; and that the court would from thence proceed *de die in diem* till those trials should be dispatched; and with regard to those whose witnesses reside in *Scotland*, their trials should be put off to the 25th. And on the next day the court ordered accordingly, and adjourned to the 15th of *July*.

*N. B.* The act of the 19th of the King, c. 1. directing that no judge shall, during the time therein mentioned †, try or bail any prisoner committed for high treason without a warrant signed by six of the privy-council, it was thought proper, *ex majori cautela*, to have such warrant directing the commissioners to proceed to the trial of those prisoners: and such warrant was procured before the trials came on.

The like caution had been before used with regard to the trial of *Christopher Layer*, while a like act was in force.

The indictment and caption made use of on this occasion were as follows. Indictment and caption.

Surry. Be it remembered, *That at a special session of oyer and terminer, and gaol-delivery of our Sovereign Lord the King, of and for the county of Surry, holden at the borough of Southwark in the said county, on Monday the 23d day of June in the twentieth year of the Reign of our said present Sovereign Lord GEORGE the Second, by the grace of God of Great Britain, France, and Ireland King, Defender of the Faith and so forth, before Sir William Lee, knight, chief-justice of our said present Sovereign Lord the King, appointed to hold pleas before the King himself,*

\* Upon the like commissions in *Middlesex* and *Surry*, anno 1716, the prisoners had three weeks from their arraignment.

† (That act was made to continue only till *April 19, 1746*, but by 19 *Geo. II. c. 17* & 20 *Geo. II. c. 1.* was farther continued till the 20th of *February* following.)

## THE REPORT.

*Sir John Willes, knight, &c.* [naming the rest of the judges and commissioners present] *and others their fellows justices and commissioners of our said present Sovereign Lord the King, assigned by letters patent of our said present Sovereign Lord the King under his great seal of Great Britain, made by virtue of the statute made in this present parliament, intituled, An act for the more easy and speedy trial of such persons as have levied or shall levy war against his Majesty, and for the better ascertaining the qualifications of jurors in trials for high treason, or misprision of treason, in that part of Great Britain called Scotland, to the said justices and commissioners above-named and others, and to any three or more of them (of whom our said present Sovereign Lord the King willed that any of them the said Sir William Lee, [naming some others of the judges] and others in the same letters patent named and appointed shall be one) to deliver the gaol of the said county of the prisoners therein being, or such as shall or may be detained in the same, on or before the first day of January in the year of our Lord one thousand seven hundred and forty-six, for or on account of the high treason mentioned in the said statute in levying war against our said present Sovereign Lord the King within this realm, and to inquire by the oath of good and lawful men of the same county of all such high treasons in levying war against our said present Sovereign Lord the King within this realm by the said prisoners or any of them, or by any other person or persons who are now in actual custody for or on account of the same, or who are or shall be guilty of high treason in levying war against our said present Sovereign Lord the King within this realm, and shall be apprehended and imprisoned for the same on or before the said first day of January in the said year of our Lord one thousand seven hundred and forty-six, and the same high treasons to hear and determine, according to the form of the said statute by the oath of Sir William Richardson of Bermondsey, knight, Sir Abraham Shard of ———, knight, &c.* [naming the grand jurors] *good and lawful men of the said county, being then and there sworn and charged to inquire for our said present Sovereign Lord the King touching and concerning the premises in the said letters patent mentioned, It is presented, That the bill of indictment to this schedule annexed is a true bill.*

## T H E R E P O R T .

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*The jurors for our present Sovereign Lord the King upon their oath present, That John Hamilton late of the city of Carlisle in the county of Cumberland esquire, otherwise called John Hamilton late of the same place gentleman, Alexander Abernethy late of the same place gentleman, otherwise called Alexander Abernethy late of the same place surgeon, and George Abernethy late of the same place gentleman, being subjects of our said present most serene Sovereign Lord George the Second by the grace of God of Great Britain, France and Ireland King, Defender of the Faith and so forth, not having the fear of God in their hearts, nor having any regard for the duty of their allegiance, but being moved and seduced by the instigation of the devil as false traitors and rebels against our said present Sovereign Lord the King their supreme true natural lawful and undoubted Sovereign Lord, entirely withdrawing that cordial love, and that true and due obedience, fidelity and allegiance, which every subject of our said present Sovereign Lord the King should and of right ought to bear towards our said present Sovereign Lord the King; and also devising and (as much as in them lay) most wickedly and traiterously intending to change and subvert the rule and government of this kingdom duly and happily established under our said present Sovereign Lord the King, and also to depose and deprive our said present Sovereign Lord the King of his title, honour and royal state, and of his imperial rule and government of this kingdom, and also to put and bring our said present Sovereign Lord the King to death and final destruction, and to raise and exalt the person pretended to be Prince of Wales, during the life of James the Second late King of England and so forth, and since the decease of the said late King, pretending to be, and taking upon himself the stile and title of King of England by the name of James the Third, to the crown and to the royal state and dignity of King, and to the imperial rule and government of this kingdom, upon the tenth day of October in the nineteenth year of the reign of our said present Sovereign Lord the King at the city of Carlisle aforesaid, in the county of Cumberland aforesaid, with a great multitude of traitors and rebels against our said present Sovereign Lord the King (to wit) to the number of three thousand persons (whose names are as yet un-*

known to the said jurors) being armed and arrayed in a warlike and hostile manner (to wit) with colours displayed, drums beating, pipes playing, and with swords, clubs, guns, pistols, and divers other weapons as well offensive as defensive, with force and arms did falsely and traiterously assemble and join themselves against our said present Sovereign Lord the King, and then and there with force and arms did falsely and traiterously, and in a warlike and hostile manner array and dispose themselves against our said present Sovereign Lord the King, and then and there with force and arms, in pursuance and execution of such their wicked and traitorous intentions and purposes aforesaid, did falsely and traiterously prepare, order, wage and levy a publick and cruel war against our said present Sovereign Lord the King, then and there committing and perpetrating a miserable and cruel slaughter of and amongst the faithful subjects of our said present Sovereign Lord the King, and also then and there during the said war with force and arms did with the said traitors and rebels so assembled, armed and arrayed as aforesaid, falsely and traiterously against the will of our said present Sovereign Lord the King, enter into and take possession of the said city of Carlisle and the castle thereto belonging within the same city, (the said city and castle being a city and castle of our said present Sovereign Lord the King) and the said city and castle with force and arms then and there did falsely and traiterously possess, hold, keep, maintain and defend, against our said present Sovereign Lord the King, against the duty of their allegiance, against the peace of our said present Sovereign Lord the King, his crown and dignity, and also against the form of the statute in such case made and provided.

N. B. This indictment and caption were made use of against all the rebels who were tried in Surry, except *Æneas Macdonald*; save that the overt acts were laid in different counties of England or Scotland, as the cases respectively required; and also save that the overt act of taking and possessing the city and castle of Carlisle was not charged on those who were not concerned in that part of the rebellion.

The indictment against *Æneas Macdonald* was in the same form, but concluding as follows: *He the said Æneas Macdonald,*

donald, otherwise called Angus Macdonald, having been apprehended and imprisoned for the high treason above mentioned, before the first day of January in the year of our Lord one thousand seven hundred and forty-six.

The reason of this averment will be mentioned in it's proper place.

P. 59.

Mr. Townly's Case. July 15, 1746.

**H**IS counsel moved, that, before any juryman should be brought to the book, the whole panel might be called over once in the prisoner's hearing, that he might take notice who did and who did not appear: which they said would be a considerable help to him in taking his challenges. This was done by order of the court, and the attorney-general did not oppose it\*.

(9 St. Tri. 543.)  
Panel called over.

Every juryman, as he came to the book, was asked whether he was a freeholder or not. Those who answered that they had no freehold in the county were examined upon a *voire dire* to that matter: and on their answering that they had no freehold, were set aside. Those who answered that they had both freehold and copyhold were asked whether both put together did amount to 10 l. a year; and if they did, that was admitted to be a good qualification, though the freehold alone was under 10 l.

Juryman must be a freeholder.

The court grounded this rule on the bill of rights and the 4<sup>th</sup> & 5<sup>th</sup> W. & M. compared.

1 W. & M.  
st. 2. c. 2.  
4 & 5 W. & M.  
c. 24. s. 15.

The prisoner's counsel offered to call a witness to shew that he was at the time of the rebellion in the service and pay of the French King, and so intitled, as they insisted, to the benefit of the cartel for exchange of prisoners: but the court declared, that such proof is not to be admitted. It is no defence in a court of law, nor is it so much as an excuse, that he had entered into the service of an open enemy. See the case of *Aeneas Macdonald*.

Service of a foreign prince no defence.

P. 59.

They then insisted on what they (very improperly) called the capitulation at the surrender of *Carlisle*. In this likewise the court over-ruled them. It is no sort of defence in a

Capitulation no defence.

\* N. B. This was done in *Loyr's* case, after a much longer debate than the matter deserved.

court of law. But, to prevent misconstructions, Colonel *Carey* was examined touching the terms upon which the surrender was made: and he swore, that the Duke expressly reserved the rebels in *Carlisle* to be dealt with as his Majesty should please.

The court then observed, that the prisoners had received the whole benefit of the terms offered by the Duke, in that they were not immediately *put to the sword*\*, but were reserved for his Majesty's pleasure; which now appears to be, that they shall have a fair trial, and liberty to make their defence according to law.

**Overt acts.** They then insisted, that the overt acts are charged in the indictment to be committed on the 10th of *October*, and that all the evidence is of overt acts subsequent to that time; and said, that however the resolutions with regard to this point may have been before the 7 *W. III. c. 3*; yet now, by that act, no evidence is to be given but of overt acts laid in the indictment, and consequently the overt acts must be proved in such manner as they are laid; that in this case especially the King's counsel are not at liberty to vary in their proofs from the day laid, since they have confined themselves in the indictment to one day, and have not charged (as they said in most of the precedents it is charged) that the defendant did commit the treason charged on him on the day laid, and at divers days and times as well before as after.

**Mr. Murray.** To this the solicitor-general answered, that the 7 *W. III.* makes no alteration with regard to this point, so as to make either time or place more material than they were before the act; the act indeed saith, that no evidence shall be given of any overt acts not laid in the indictment. But what is or is not evidence of such overt acts is left upon just the same foot in this respect as it was before the act; what was evidence at common law is in this respect evidence still; and as to the charging the overt acts at divers days and times as well before as after the day particularly mentioned, he said that the greatest part of the precedents he had seen of indictments for levying war, which is the present case, do charge the overt acts on one day only.

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\* See Lord *Winton's* trial, 6. St. Tri. 39.



## THE REPORT.

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Sir *Richard Lloyd* offered to speak on the same side : but the court told him, he needed not to give himself the trouble of speaking to the point, on which there could be no doubt ; and over-ruled the objection \*.

Mr. *Townly* was convicted and executed.

### Mr. *Deacon's* Case. July 17, 1746.

IN Mr. *Deacon's* case, his counsel objected to the receiving (9 St. Tri. 558.)  
the evidence of one *Craig* a printer, touching the prisoner's Overt acts.  
obliging him to print the Pretender's manifesto at *Manchester*, and his publishing it there, while the rebel army was in the town ; and also to the reading the manifesto. They insisted, that this ought not to be given in evidence, because it is an overt act not laid in the indictment ; and also because the orders were given and the manifesto printed and published in *Manchester*, and all the overt acts are laid in *Cumberland*.

But it was answered by the court (Lord Chief-Justice *Willes*, Justice *Abney*, and Justice *Foster*) that an overt act not laid may be given in evidence, if it be a direct proof of any of the overt acts that are laid.

One of the overt acts charged in this indictment is the assembling and marching *modo guerino*, in order to depose the King and to set the Pretender on the throne. It is proved, that the prisoner with the rest of the rebel army was at *Manchester*, and appeared in an hostile manner there. Now what stronger proof can there be that the prisoner joined this army for the purpose mentioned in the indictment, than his causing to be printed and dispersed among the people the Pretender's manifesto ? It never was doubted, that the being present with rebels and joining in proclaiming the Pretender might be given in evidence on such an indictment as this ; and yet that circumstance was never expressly laid in any indictment. But

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\* The Lord *Balmaine*, who had neither counsel nor witness at his trial, insisted on the same point : and the house, out of their extreme tenderness in case of life, (after my Lord Chancellor had delivered his opinion clearly that the time is not material, provided the treason be committed before the bill found) put the question to the judges. Lord Chief-Justice *Lee* delivered the unanimous opinion of the judges, that the day is not material, provided the treason be proved to have been committed before the finding the bill. (See the printed Trial, p. 24—27. And see 3 Inst. 230. Kel. 16. 1 Hale 361. 2 Hale 379, 291.)

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## THE REPORT.

it is sufficient that it proves *quo animo* the rebel army was raised, and *quo animo* the prisoner joined it.

As to the objection that this fact was not committed in *Cumberland*, where all the overt acts are laid, Mr. Justice *Abney* and Mr. Justice *Foster* held, that it is indeed necessary on this indictment that *some* overt act laid be proved on the prisoner in *Cumberland*; but that being done, acts of treason tending to prove the overt acts laid, though done in a foreign county, may be given in evidence.

And the manifesto was read.

Lord Chief-Justice *Willes* declined giving any opinion on the second point. But no objection was made during the whole course of the trials to the giving evidence of overt acts in a county different from that where the fact was laid, an overt act having been first proved in the proper county; and that sort of evidence was given in almost all the trials\*.

*Deacon* was convicted and executed.

*John Berwick's Case. July 17, 1746.*

(9 St. Tri. 559.)  
Two witnesses.

IN the case of *John Berwick*, there was only one witness that proved him to have been in arms with the rebels. This witness proved, that he was inrolled and reviewed as a lieutenant in the regiment called the *Manchester* regiment, and did duty as such at *Penrith* and *Carlisle*.

Two other witnesses (officers in the Duke's army) swore, that after the surrender of *Carlisle* they were ordered by the Duke to take an account of the names of the officers and of their respective ranks in the rebel garrison; that accordingly they went to the prison where the officers were confined apart from the common men, and took such account of them; that the prisoner *Berwick* appeared among the officers, and gave in his name to them as lieutenant in the *Manchester* regiment.

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\* The like evidence was given in most of the trials after the rebellion of 1715; and admitted by the judges upon the commission in the North this Summer.

See the cases of *Lacy* and *Sir William Parkyn*, in the State Trials, VI. 319. IV. 627.

Lord

## THE REPORT.

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Lord Chief-Justice *Willes* and Mr. Justice *Abney* were of opinion, that this declaration of the prisoner is not to be considered as a bare *confession after the fact*, but as an evidence of the fact itself, *viz.* that the prisoner did appear and take the rank of a lieutenant in the rebel garrison. They thought too, that a confession after the fact, proved by two witnesses, was sufficient to convict within the 7 *W. III.*

Mr. Justice *Foster* doubted whether this declaration, being made *after the surrender*, can be considered in any other light than as a confession after the fact \*. And with regard to a confession after the fact, he said he never doubted whether it might be given in evidence as a corroborating proof: his doubt was, whether it being proved by two witnesses is a conclusive evidence, or an evidence sufficient of itself to convict without other proof; since the 7 *W. III.* seems to require two witnesses to overt acts, or a confession in *open court* †.

*Berwick* was convicted upon the evidence of the officers and of the other witness, and was executed.

July 22, 1746.

All the prisoners who then stood convicted were brought to the bar to receive judgment; and their counsel, Serjeants *Wynne* and *Eyre*, took two exceptions in arrest of judgment.

Exceptions in  
arrest of judgment.

1. That the teste of the commission is not set forth in the caption of the indictment; and consequently, for aught appearing on the record, the commission might issue before the commencement of the act on which this commission is grounded; and if so, the whole proceeding is *coram non judice*.

To this it was answered by the attorney-general, and agreed by the court, that the jurisdiction of the court doth sufficiently appear on the record. The act of parliament is undoubtedly the foundation of this proceeding: the act, and this commission grounded on it, are recited in the caption; and it is ex-

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\* Upon farther consideration, I doubt there was too much refinement in this distinction. See 1 Disc. c. 3. f. 8.

† The like evidence was holden sufficient upon the commission in the North this Summer; upon the authority of the judges' opinions previous to the trials of *Grogg* and *Francia*. See my Discourse on High Treason, chap. 3. f. 8.

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## THE REPORT.

presly alledged, that the commission did issue by virtue of the act; which could not be true unless the commission was subsequent to it.

Their second exception, and on which they seemed chiefly to rely, was that the act impowers the crown to issue commissions for trying persons *then in custody or who shall be in custody for high treason in levying war before the first day of January next*, and it is not alledged in the indictment that the prisoners were in custody at the time of the indictment; and consequently it doth not appear on the record, that the court hath any jurisdiction over the prisoners \*.

To this it was answered by the attorney-general, and agreed by the court, that it doth sufficiently appear on the record as it now stands, though not indeed on the indictment, that the prisoners are in custody; the record alledgeth that the prisoners at the time of their arraignment being brought to the bar in the custody of the sheriff, to whose custody they had before been committed for the cause aforesaid, were asked, &c.

The common commission of gaol-delivery extendeth only to prisoners in actual custody; and yet it was never thought necessary to alledge in the indictment that the defendant was then actually in prison: and if this exception was to prevail, it would impeach all the judgments that ever have been given at any sessions of gaol-delivery †.

That the act on which the *Preston* rebels were tried runs in the very words of this act; all the indictments at that time were as these are, and this very exception was then taken and over-ruled.

Lord Chief-Justice *Lee* produced a note he took at that time, in the case of the *King* and *Oxburgh*: the same exception was then taken and over-ruled upon the reason last before given ‡.

Judgment was then given as in cases of high treason.

Mr. Serjeant *Eyre* afterwards, viz. August 2d, took an exception that bears some affinity to the last in behalf of *Donald*

\* See the Case of *Æneas MacDonald*, inf. 59.

† *Vide* 12 Mod. 449. the same point.

‡ Upon the trials of the Lords *Kilmarnock*, *Cromartie*, and *Balmerino*, to guard against this objection, the warrants for their commitment were returned by the lieutenant of the Tower, read and entered on the journal. (See the proceedings in print, p. 10.)

*McDonald* and some others, who then stood convicted and were brought to the bar to receive judgment: It was, that it doth not appear that the prisoners were *apprehended*; and, saith he, in fact they were not apprehended but surrendered; whereas the act of parliament on which the commission is grounded speaks only of persons that shall be *apprehended* and in custody.

This fine-spun objection was likewise over-ruled. The surrender was as much upon compulsion, as the submission of a person who cries for quarter in the heat of battle is. In both cases the submission is by reason of a superior force, and for fear of immediate death.

*Alexander McGrowther's Case. July 31, 1746.*

IN the case of *Alexander McGrowther*, there was full evidence touching his having been in the rebellion; and his acting as a lieutenant in a regiment in the rebel army called the Duke of *Perth's* regiment. The defence he relied on was, that he was forced in.

(9 St. Tri. 566.)  
Force relied on  
as a defence.

And to that purpose he called several witnesses, who in general swore that on the 28th of *August* the person called Duke of *Perth*, and the Lord *Strathallan*, with about twenty highlanders, came to the town where the prisoner lived; that on the same day three several summonses were sent out by the Duke, requiring his tenants to meet him, and to conduct him over a moor in the neighbourhood, called *Luiny Moor*; that upon the third summons the prisoner, who is a tenant to the Duke, with about twelve of the tenants appeared; that then the Duke proposed to them that they should take arms and follow him into the rebellion; that the prisoner and the rest refused to go; whereupon they were told, that they should be forced, and cords were brought by the Duke's party in order to bind them; and that then the prisoner and ten more went off, surrounded by the Duke's party.

These witnesses swore, that the Duke of *Perth* threatened to burn the houses, and to drive off the cattle of such of his tenants as should refuse to follow him.

They

They all spake very extravagantly, of the power lords in *Scotland* exercise over their tenants; and of the obedience, (even to the joining in rebellion,) which they expect from them.

Lord Chief-Justice *Lee*, in summing up, observed to the jury, that there is not, nor ever was, any tenure which obligeth tenants to follow their lords into rebellion.

And as to the matter of force, he said, that the fear of having houses burnt or goods spoiled, supposing that to have been the case of the prisoner, is no excuse in the eye of the law for joining and marching with rebels \*.

The only force that doth excuse is a force upon *the person*, and present fear of death; and this force and fear must continue all the time the party remains with the rebels. It is incumbent on every man, who makes force his defence, to shew an actual force, and that he quitted the service as soon as he could; agreeably to the rule laid down in *Oldcastle's* case, that they joined *pro timore mortis*, & *recesserunt quam cito potuerunt*.

† Hale 50.

He then observed, that the only force the prisoner pretends to was on the 28th of *August*; and that he continued with the rebels and bore a commission in their army till the surrender of *Carlisle*, which was on or about the 30th of *December*.

The jury without going from the bar found him guilty. But he was not executed.

*N. B.* All the judges that were in town were present, and concurred in the points of law.

*N. B.* Many of the *Scotch* prisoners made force their defence, and produced the same sort of evidence as *McGrowth* did; and the same directions in point of law were given as in his case: and the matter of fact, whether force or no force, and how long that force continued, with every circumstance tending to shew the practicability or impracticability of an escape †, was left to the jury on the whole evidence.

*August* 23, 1746.

This day bills of indictment were found against *Alexander Kinloch* and *Charles Kinloch* and others of the rebels, to the

Scotchmen  
tried in Eng-  
land for treason  
committed in  
Scotland.

\* *N. B.* If threats of this kind were an excuse, it would be in the power of any leader in a rebellion to indemnify all his followers.

† See 1 Discourse, chap. 2. §. 8.

number

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number of twenty-two. The overt acts were laid in different shires in *Scotland*, according to the respective cases of the prisoners. And then the court adjourned to the 2d of *September*, for the arraignment of the prisoners.

*September 2, 1746.*

On this day (there being no other judge in town) Mr. Justice *Foster* sat with two other commissioners for the arraigning the prisoners. *Alexander Kinloch* and *Charles Kinloch*, and the rest of the prisoners, who were *Scotchmen*-born, upon their arraignment severally delivered a paper into court, whereof the following is a copy.

“ As I intend to insist on the benefit of the Act of Union,  
“ by which all the laws in *Scotland* at that time which concern  
“ private right are saved to the natives of *Scotland*, and declared  
“ to be unalterable by the parliament of *Great Britain*, except  
“ for the evident utility of the subjects within *Scotland*; and  
“ as I am a subject born within *Scotland*, and stand indicted for  
“ treasons charged to have been committed by me in *Scotland*,  
“ I humbly beg that the court will be pleased to assign me  
“ counsel and a solicitor to advise me as to the manner of fram-  
“ ing, and the use to be made of this defence; and that the court  
“ will be pleased to indulge me in a few days time to advise  
“ with them, before I am compelled to plead; lest by plead-  
“ ing I may be deprived of the benefit of any such defence.”

Mr. Justice *Foster* told the prisoners, that copies of their indictments having been delivered to them in due time, they ought now to have been ready to plead such pleas as they would stand by; and that the court expected they should now plead accordingly. He told them withal, that if the matter contained in their papers would avail them at all, they would have the full benefit of it upon not guilty; since it amounts to no more than that their cases are not within the act of the last session, by authority of which act alone this court sits. They then severally pleaded not guilty.

The

The Case of *Alexander Kinloch* and *Charles Kinloch*. October 28, 1746.

(1 Will. 157.)

**P**RESENT Lord Chief-Justice *Willes*, Mr. Justice *Foster*, and Mr. Baron *Clive*; *Alexander Kinloch* and *Charles Kinloch*, who were the first of the prisoners concerned in the paper delivered the 2d of *September* that were brought to trial, were set to the bar; and they agreeing in their challenges, one jury was sworn and charged with them by the clerk of the arraignments. The junior counsel for the crown opened the indictment, and the solicitor-general in a few words opened the evidence.

When the counsel for the crown had proceeded thus far, the Chief-Justice, before any evidence was given, told the prisoners' counsel, that he was informed they had some objection to make in behalf of their clients, grounded on the Act of Union. Which objection, he said, was proper to be spoke to before the counsel for the crown went into their evidence. Whereupon Mr. *Fodrell*, one of the prisoners' counsel, stated his objection, and spake largely to it. The Chief-Justice then said, that the objection, being in nature of a plea to the jurisdiction of the court, could not be made on the issue of not guilty; nor could any evidence in support of the objection be received upon that issue; and therefore proposed that a juror should be withdrawn; and that the prisoners should have leave to withdraw their pleas of not guilty, and to plead this matter specially; and that the attorney-general might demur; and so the point would come regularly before the court.

Mr. Justice *Foster* said on this occasion, that when he assured the prisoners they would have the full benefit of this objection on their plea of not guilty, he had no intention of leading them into a difficulty, which they could not get clear of, without the indulgence of the court. He thought they would be intitled *ex mero jure* to the full benefit of the objection, without such indulgence; and added, that the principle he went upon was this, If there be any weight in the objection, it must be that the case of the prisoners is not within the act of the last session, under



der which act alone this special commission is executed. And if it be not within that act, it is a case at common law; and consequently, taking it to be a case at common law, if no overt act be proved in the county where the commission sits, and whence the jury comes, the prisoners must of course be acquitted.

Sir *John Strange* of counsel with the crown strongly insisted, that in point of law the prisoners were intitled to the benefit of the objection on not guilty, if they could avail themselves of it: and the attorney-general offered to wave all advantage that might be taken against the prisoners; if any advantage could be taken; and pressed that the trial might go on upon the issue joined by them, and that the merits of the objection might be now considered.

But it was otherwise ordered: And a juror was withdrawn and the jury discharged upon the motion of the prisoners' counsel, and at the prisoners' request, and with the consent of the attorney-general. And the prisoners withdrew their former plea, in order that they might be ready the next day with their pleas to the jurisdiction in form. To which the attorney-general declared he would demur *instantly*. A juror withdrawn.

And the court adjourned to the next day.

The entry on the record touching this matter is as followeth:

*Upon the motion of Charles Hamilton Gordon esquire and ———— Judrell esquire, being assigned as counsel for the defendants in this cause, and by their consent, and also at the desire and request and by the consent of the defendants now at the bar here, and also by the consent of Mr. Attorney-general on behalf of the King, It is ordered by the court here, that Richard Foy the last of the jurors sworn and impanelled in this cause be withdrawn out of the panel; and that the rest of the jurors in this cause be discharged; no evidence whatsoever having been given to the said jury in this cause either on the part of the King or of the defendants. And it is farther ordered by the court here, that the said defendants have leave to withdraw their pleas of not guilty by them formerly pleaded to the indictment in this cause, and have leave to plead to the jurisdiction of this court; and*

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that

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*that the said defendants have time till to-morrow to put in such plea; and that they deliver copies of such plea to Mr. Shampe solicitor for the King in this cause by eight of the clock this evening. And thereupon the said defendants do now here at the bar withdraw their said pleas of not guilty, in order to put in such plea to the jurisdiction of this court as aforesaid.*

October 29, 1746.

On this day, present the same judges as yesterday; *Alexander Kinloch* was first set to the bar and again arraigned, whereupon he tendered a plea ingrossed on parchment and signed by his counsel *Mr. Gordon* and *Mr. Fedrell*; to which the attorney-general demurred, and the prisoner instantly joined in demurrer.

Plea to the jurisdiction of the court.

*And the said Alexander Kinloch in his own proper person comes, and having heard the indictment aforesaid read, and protesting that he is not guilty of the premises charged in the said indictment, for plea nevertheless saith, that he ought not to be compelled to answer to the said indictment; Because he saith that the kingdom of Scotland before and until the time of the union of the two kingdoms of England and Scotland was regulated and governed by the proper laws and statutes of that kingdom, and not by the laws or statutes of the kingdom of England; and that ever-since the said union of the said two kingdoms that part of the realm of Great Britain called Scotland hath been, and yet is governed and regulated by the proper laws of that part of the said realm called Scotland, and not by the laws of that part of the said realm called England.*

*And the said Alexander Kinloch farther saith, that within the said kingdom before the union of the said two kingdoms, and until the said union thereof, and within that part of Great Britain called Scotland ever-since the said union, there hath been and now is a certain court called the court of justiciary; and that all and singular offences of high treason committed within the said kingdom of Scotland before and until the said union, and within that part of the realm of Great Britain called Scotland since the said union by the natives thereof, apprehended or taken for such offences there (except peers of the realm of Great Britain)*

Britain) have been and of right ought to be inquired of, heard and determined in the said court of justiciary before the justices of that court, or in some other courts or before other justices within the said realm of Scotland before the union, and within that part of the realm of Great Britain called Scotland since the said union; and not in any courts or before any justices within the realm of England before the said union, or within that part of the realm of Great Britain called England since the said union.

And the said Alexander Kinloch farther saith, that Fochabars in the shire of Murray in the said indictment mentioned, the place where the said offence contained in the said indictment is supposed to have been committed, before and until the said union of the said two kingdoms was within and parcel of the said kingdom of Scotland, and ever-since the said union was and now is lying within and parcel of that part of the realm of Great Britain called Scotland.

And the said Alexander Kinloch farther saith, that he was born within that part of the realm of Great Britain called Scotland (to wit) at Fochabars aforesaid; and that at the time when the said offence in the said indictment contained is therein supposed to have been committed and long before that time and since, he the said Alexander Kinloch was resident and commorant within that part of Great Britain called Scotland (to wit) at Fochabars aforesaid. And this he is ready to verify. Wherefore the said Alexander Kinloch prays judgment, If the court of our Lord the King here will farther proceed upon the indictment aforesaid against him, and that he may be dismissed from the court here of and upon the premises, &c.

And the said Sir Dudley Ryder knight, attorney-general of our present Sovereign Lord the King, who for our said present Sovereign Lord the King in this behalf prosecuteth, as to the said plea of him the said Alexander Kinloch by him above pleaded as aforesaid, for our said present Sovereign Lord the King saith, that the said plea and the matter therein contained are not sufficient in law to preclude the court here from their jurisdiction to hear and determine the high treason mentioned and specified in the said indictment, and above charged upon him the

Demurres.

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*said Alexander Kinloch in and by the said indictment. Wherefore for want of a proper and sufficient answer in this behalf be prayeth judgment, and that the said Alexander Kinloch may answer in court here to our said present Sovereign Lord the King touching and concerning the premises aforesaid.*

Joinder in de-  
murrer.

*And the said Alexander Kinloch likewise.*

The prisoner's counsel admitted, that his case is within the letter of the act of the last session by authority of which this court sits; but insisted, that by the known rules of construction, if any great or manifest inconveniences do arise from adhering closely to the letter of the act, the court ought, and always doth depart from the literal construction.

The construction they insisted on was, that for offences committed in *England*, commissions might issue for hearing and determining the same into any county of *England*; and for offences committed in *Scotland*, the like commissions might issue into any county of *Scotland*, which would, they said, answer all the ends of the act, mentioned in the preamble; and would at the same time avoid all the inconveniences which the construction contended for in behalf of the crown is attended with.

They then mentioned several inconveniences attending such a construction of the act; some of which might possibly have merited the attention of the legislature at the time the act passed.

Mr. Attorney-general in answer said, that the rules of construction as applied to acts of parliament grounded on inconveniences, whether imaginary or real, hold in no cases but where the meaning of the act is doubtful; in plain cases where the intention of the legislature is evident, it is the duty of the court to put the law in execution, and to leave all considerations of inconveniences to the legislature: and if the parliament had intended that different commissions should issue for the trial of treasons committed in *England* and *Scotland* respectively, they would have said so; they would not have impowered his majesty to issue commissions into any county or shire within the united kingdom.

And

And the objection, he said, is not new; it was made, but without effect, in behalf of a *Scotchman* concerned in the rebellion of 1715\*.

1 Geo. I. c. 33.

The Lord Chief-Justice declared his opinion, in which the other judges present concurred, that the prisoner's birth, residence and apprehension in *Scotland*, are facts perfectly immaterial to the present question; that they would have been so if the case had been at common law; for at common law every man is triable, not where he was born, resided, or was apprehended, but where the fact was committed; that these facts being immaterial, and the whole merits of the objection appearing on the face of the indictment, the prisoner might as well have demurred to it, as pleaded in the manner he hath done.

That in so plain a case as this is, arguments *ab inconvenienti* are of no weight; the law must take its course: inconveniences in plain cases are proper only for the consideration of the legislature.

His Lordship observed, that the words, *This realm*, occur in four or five places in the act, and that in every place where they do occur, except in the clause in question, they incontestibly mean the united kingdom of *Great Britain*, and can mean nothing else: and by no rule of construction can they be restrained in this single clause, to that part of the kingdom called *England*.

The court over-ruled the plea, and ordered that the prisoner should plead over to the treason, and he pleaded not guilty. *Charles Kinloch* was then brought to the bar, and being arraigned a second time on the indictment pleaded likewise not guilty: and both prisoners agreeing to join in their challenges, a jury (the same persons who were sworn and charged with them yesterday) was sworn and charged with them. And they were both found guilty, but not executed.

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\* This was the case of *William Hay* upon the special commission at *Carlisle* in the year 1716. The objection was then introduced not by way of plea to the jurisdiction, but by demurrer. And the court after hearing the prisoner's counsel adjourned to the next day; and having considered the arguments of the prisoner's counsel agreed to over-rule the demurrer. Which being intimated to his counsel, he by leave of the court and with the consent of the solicitor-general withdrew his demurrer, and pleaded guilty.

*Sir John Wedderburn's Case. November 4,  
1746.*

(9 St. Tri. 580.)  
Overt acts.

**T**HE overt acts were laid at *Aberdeen* in the shire of *Aberdeen*. It was proved by two witnesses, that he was with the rebels at *Aberdeen*; and by those and other witnesses, that he was at divers other places with them.

The king's counsel called witnesses who proved likewise, that he was appointed by the Pretender's son collector of the excise; and that he did actually collect the excise in several places where the rebel army lay, by virtue of that appointment, for the use of the rebel army.

The prisoner's counsel insisted that this sort of evidence ought not to be admitted; for though collecting money for the service of rebels is an overt act of high treason, yet it not being laid in the indictment, no evidence ought to be given of it; and they relied on the statute of the 7th of King *W.* But in this they were over-ruled, upon the reasons before given in the case of *Deacon* \*.

P. 9.

*November 15, 1746.*

Motion in arrest of judgment.

Mr. Jodrell.

On this day, present the two Chief-Justices, Mr. Justice *Wright*, Mr. Baron *Reynolds*, Mr. Justice *Abney*, Mr. Justice *Foster*, and Mr. Baron *Clive*; all the prisoners who were convicted since the last execution were brought to the bar to receive judgment. The two *Kinlochs*, *Alexander* and *Charles*, moved by their counsel in arrest of judgment: he took notice of the proceedings with regard to the prisoners on the 28th and 29th days of *October*, and insisted that their trial on the 29th (a jury having been sworn and charged with them on the 28th) was a *mistrial*, and the verdict a mere nullity.

He was proceeding to state his reasons and authorities, when Lord Chief-Justice *Lee* interrupted him and said, That as there is a variety of opinions in the books touching that matter, which is really a point of great consequence, he thought it most advisable to postpone the farther consideration of it to the next adjournment, when he should desire the assistance

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\* See the cases of *Rootwood* and *Lowick* in the 4th State Trials, 649, &c. 706, &c.

of all the judges in the commission. Then the court, after passing sentence on the others, adjourned to the 15th of December.

*N. B.* The court being full, and the bar crowded in expectation of the event of this motion, Mr. Justice *Foster* thought it not improper to speak to the purpose he spake on the 28th of *October*: and he added, That, from what was said by the court on the 29th, he was confirmed in his opinion that the prisoners might safely have pleaded the general issue; for if, as was then admitted, the whole merits of the objection appear on the face of the indictment, the prisoners undoubtedly might have had the benefit of it in arrest of judgment. So that *quacunq; viâ*, whether they could have been let into it on evidence (as they certainly might) or in arrest of judgment, they were not ill-advised in pleading the general issue.

December 15, 1746.

On this day, present the two Chief-Justices, the Chief-Baron, Mr. Justice *Wright*, Mr. Baron *Reynolds*, Mr. Justice *Abney*, Mr. Justice *Denison*, Mr. Baron *Clarke*, Mr. Justice *Foster*, and Mr. Baron *Clive*; Mr. *Jodrell* argued in behalf of the *Kinlocks* in arrest of judgment.

He admitted, that there is a variety of opinions in the books touching the power of the court to discharge a jury sworn and charged in a capital case; and that the practice, during the reign of King *Charles* the second at least, went in favour of that power. But he said, that ever-since the revolution the contrary practice hath uniformly prevailed: and even in the time of *James* the second the judges in Lord *Delamere's* case 4 St. Tr. declared, that a jury sworn and charged in a capital case cannot be discharged, but must give a verdict; and common justice, he said, requires, that when a prisoner is brought upon his trial, and a jury is once sworn and charged with him, he should stand or fall by the event of that trial; otherwise his life may be brought in jeopardy for the same fact as often as the court pleaseth, and even when he is not so well prepared for his defence.

To shew that the law and practice before the restoration was with his clients, he relied on the authority of Lord *Coke* in his 1st Inst. 227. b. and 3d Inst. 110; and to shew that the

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judges since the revolution concurred with Lord *Coke*, he cited *Carthew* 465, where it is reported to have been said by *Holt* at the sittings in *Guildhall* on the ninth day of *November* 1698, in the case of *The King* and *Perkins*, "That all the judges of *England* upon debate among themselves had agreed, that a jury sworn and charged in a capital case cannot be discharged, though all the parties consent to it."

He said, that he had seen a MS. note of the same resolution by the late Mr. Justice *Tracy*, which agrees in substance with *Carthew's* report of it.

He observed, that according to *Carthew's* report and *Tracy's* MS. the judges at the same time came to a resolution, that in criminal cases, not capital, a juror may be withdrawn or jury discharged by consent of all parties, but not otherwise.

(Stur, 934.)

That the practice since that time in criminal cases hath been conformable to this rule. For this he cited the cases of *The King* and *Morgan*, *Hilary* 9 *Geo.* II. on an indictment for perjury, and *The King* and *Jelf*, *Trinity* 7 *Geo.* II. on an indictment for barratry; in both these cases Lord *Hardwicke*, he said, at the sittings refused to withdraw a juror at the prayer of the King's counsel, because the defendants' counsel refused to consent to it; and cited this resolution in *Carthew*. The use he made of these two cases was, that since this regard hath been paid to the authority of the resolution in criminal cases as reported by *Carthew*, he hoped the same regard would be now paid to that touching capital cases.

As to the matter of consent, he observed that consent may cure an irregularity, but cannot justify the breaking through any of the fundamental principles of law; especially such rules as are in favour of a prisoner who is answering for his life. A prisoner in this circumstance is hardly *sui juris*: he may be overawed or surprized into a consent, manifestly to his prejudice: and therefore the judges in the resolution cited from *Carthew* (on which he relied as an authority in point with him) threw the circumstance of the consent quite out of the case.

Upon the whole he concluded that judgment ought to be arrested.

To



To this it was answered by the counsel on the part of the crown, that, except the resolution reported by *Carthew*, there is not a single authority in the books which saith that a juror may not be withdrawn or the jury discharged, even in capital cases, with the consent of all parties. That it was done in the case of *Mansell* so long ago as the 26th of *Eliz.* And all the judges of *Serjeants-inn* in *Fleet-street* then agreed, that it might be done; and had often, to their knowledge, been done. That the rule laid down by Lord *Coke* in his first and third institutes runneth in general terms and doth not indeed except the case of consent, but that case must be supposed to be excepted,

Mr. Attorney,  
general.  
Sir John  
Strange.  
Mr. Solicitor-  
general.

1 And. 103,  
104-

That it frequently hath been done since Lord *Coke's* time, even without consent, where the circumstance of the prisoner, or the demands of publick justice did require it. And for this they cited 2 *Hale* 295, 296, 297. 1 *Vent.* 69. *Kel.* 26, 47, 52.

They said they did not cite these books with an entire approbation of the practice in every instance in which it prevailed; for some of the cases, particularly *Whitebread's*, ought never to be drawn into example; but only to shew what the opinion of those times was,

2 St. Tri. 827,

That the opinion of the judges in Lord *Delamere's* case doth not affect the present question; for the only question proposed to the judges was, Whether in the trial of a peer in the court of the Lord High-Steward the court might, after evidence given, adjourn the peers-triers from day to day. The judges did not presume to answer that question, it being a point of judicature, of which that court alone was the proper judge. But they did say, that, in the case of a common jury sworn and charged, they ought to give their verdict before they are discharged; meaning only, that a jury in a capital case cannot be adjourned and separated after evidence given, but must be kept together till they agree on their verdict. The occasion which led them to say this sheweth, that the case of an adjournment was what they had then in contemplation, and not the case of a total dismissal of the jury; and so doth the reason they give for the practice; this, they say, is done for fear of tampering and corruption. In the case of a bare adjournment there may be room for this fear, but in the case of  
a total

a total dismissal, when no verdict is to be given, there cannot.

4 St. Tri. 649,  
&c.

They insisted on *Rookwood's* case as a case in point: for had the prisoner's counsel taken exceptions to the indictment coming within the restrictions of the act of the 7th of King *William*; and had those exceptions been allowed, the indictment must have been quashed, and the jury, though sworn and charged, must have been dismissed: and yet it cannot be imagined, that the quashing that indictment and discharging that jury would have discharged the prisoner from answering to the treason on a fresh bill of indictment.

As to the three resolutions reported by *Carthew*, the two last, they said, are manifestly against law, in the latitude laid down in that book. The King in a civil case may by his prerogative withdraw a juror, for he cannot be nonsuited; and it is frequently done in informations in the Exchequer on account of the revenue: and though the court refused to do it in the cases of *Morgan* and *Jelf* cited on the other side, yet in the case of one *Wilkinson*, *Pascha* 6 *Geo.* II. which was an indictment for misapplying money raised on the scavengers' rate, the court did discharge the jury at the prayer of Mr. Justice *Abney* then one of the King's counsel, without the defendant's consent.

2 Hale 224.

It is objected, that a prisoner may be drawn into a consent to his own prejudice; but certainly a prisoner may do much more than consent, he may abandon all defence, he may plead guilty. He may on his trial wave all his challenges and put himself on the first twelve that shall appear. An accessory cannot be brought to his trial before the principal is convicted or outlawed; but if he pleaseth he may wave that privilege and submit himself to a trial, and it shall not be error *because he consented*. Besides, in the present case, what was done was at the prayer of the prisoners, and, as the court then, took the case, manifestly for their advantage.

1 Hale 35.

Cases may happen, where the court, *ex debito justitiæ*, and out of regard to the prisoner, ought to discharge the jury, and postpone the trial. The case put by Lord *Hale* of a madman putting himself on his trial is strong to this

this purpose; and other cases of the like kind may be put.

On the whole they prayed judgment for the King.

Sir *John Strange* cited a record of *Hilary 8 H. VII. Rot. 3*, a copy whereof he brought into court. It was an indictment for murder, and not guilty pleaded. The jury, having heard all the evidence, withdrew to consider of their verdict, and being returned, delivered their verdict into court in writing; and being examined by the court how they came by that writing confessed it was delivered into their hands by the prisoner at the bar as they passed by him. The court thereupon discharged the jury of the prisoner, and committed them for this misbehaviour; and a new venire was awarded; and the second jury brought him in not guilty.

The arguments being long, and the day far-spent, the court deferred giving their opinion to the 20th.

December 20, 1746.

On this day, present the same judges as on the 15th; the court delivered their opinions *seriatim*. And all, except one, agreed, that judgment ought to pass upon the prisoners. They agreed, that admitting the rule laid down by Lord *Coke* to be a good general rule, yet it cannot be universally binding: nor is it easy to lay down any rule that will be so. The rule cannot bind in cases where it would be productive of great hardship or manifest injustice to the prisoner. Opinions of the judges.

In the present case, the prisoners were advised upon their trial to object to the jurisdiction of the court; but having pleaded to issue, it was said that they were too late with that objection. In order therefore to let them into the benefit of this objection, liberty is given them, at their request, to withdraw their plea of not guilty, before evidence given, and to plead to the jurisdiction. Now the plea of not guilty being withdrawn, the jury had no issue to try, nor evidence before them, and must of course therefore be discharged; and consequently the prisoners have no right to complain of that which was a necessary consequence of an indulgence shewn them by the court.

The judges who concurred in this opinion paid very little regard to the resolution reported by *Carthew*; not only for the

the reasons insisted on by the counsel for the crown, but because, as no other printed report of that time taketh any notice of this resolution, it is very doubtful whether there ever was any such resolution or not; especially since Mr. Baron *Clarke* informed the court that he hath a MS. report of the late Lord Chief-Justice *Eyre* of the case of *The King* and *Perkins*, in which case *Carthew* supposeth *Holt* to have reported this resolution.

The case was thus, *Perkins* was indicted for perjury in an answer in Chancery; the issue came on to be tried before *Holt* at the sittings in *Guildhall* the ninth day of *November* 1698, when the bill was produced by the counsel for the prosecution in order to intitle them to read the answer, it appeared that the bill had never been filed, so that neither bill nor answer could be read. *Holt* offered to stay till the prosecutors could send the bill to the office and have it filed. But they foreseeing that it could not be done in any reasonable time, their counsel insisted, on behalf of the crown, upon withdrawing a juror: *Holt* would not allow of it, and the defendant was acquitted.

*Holt* upon this occasion said, "I have had occasion to consider of this matter. In criminal cases a juror cannot be withdrawn but by consent: and in capital cases it cannot be done, even with consent."

This is the whole of the case, as reported by *Eyre*; not a word of any resolution of the judges on the point. And *Holt's* manner of expression, *I have had occasion to consider*, seemeth to imply that the opinion he gave was the result of his own thoughts on the subject.

With regard to *Tracy's* MS. it was observed by Mr. Justice *Abney*, that *Tracy* was \* not an *English* judge at the time the judges are supposed to have come to these resolutions, or even so early as the year 1698; and therefore he must have taken up the matter upon report at second hand.

They all agreed, that the opinion of the judges in Lord *Dela-  
mere's* case doth not affect this question for the reasons insisted on by the King's counsel; and joined in condemning the proceedings in the cases of *Whitebread* and *Fenwick*, as cruel and illegal.

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\* He was an *Irish* judge at this time.

The learned judge who dissented admitted, that the discharging the jury in the present case was an instance of great indulgence towards the prisoners. But he thought it safer to adhere to the rule of law, which is clearly laid down by lord *Coke*, than, upon any account, to establish a power in judges, which, it is admitted, hath been grossly abused, and may be so again.

(Sir Martin Wright.)

He observed, that *Mansell's* case was the first, and, except the present, is the only case wherein the prisoner's consent appears to have been taken: and that the asking the prisoner's consent in *Mansell's* case plainly betrayeth a consciousness in the judges that the thing was irregular, and could not be done at the discretion of the court.

Cases, he said, have been put, where the circumstances of the prisoner seem to require that such a power should be lodged in the court: and other cases may be put, where publick justice seemeth to require the same. But these are particular and single inconveniences; and the policy of the law of *England*, and indeed the true principles of all government, will rather suffer many private inconveniences, than introduce one publick mischief.

He considered the trial by the same jury which is sworn and charged with the prisoner, as part of the *jus publicum*; as a sacred *depositum* committed to the judges, which they ought to deliver down inviolate to posterity; and concluded, that, the trial on the 29th being irregular, no judgment ought to be given on that conviction.

But judgment was given as in cases of high treason.

Mr. Justice *Foster* delivered his opinion in this case as followeth.

This case hath been very well argued at the bar; but the counsel on both sides went into the general question, touching the power of the court to discharge juries sworn and charged in capital cases, farther than I think was necessary.

The general question is a point of great difficulty, and of mighty importance; and I take it to be one of those questions, which are not capable of being determined by any general rule that hath hitherto been laid down, or possibly ever may be. For I think it is impossible to fix upon any single rule which  
can

can be made to govern the infinite variety of cases which may come under this general question, without manifest absurdity; and in some instances, without the highest injustice.

I therefore choose to consider the present question singly as it standeth upon the record, and to throw out of it every consideration that is foreign to it; and possibly, by so doing, most of the objections which have been made in the present case may receive this short answer, That they are levelled at an *improper exercise* of the power, but do not reach the present case.

The question therefore is not, Whether a jury may be discharged after evidence given, in order to the preferring a new indictment better suited to the nature of the case; where, through the ignorance or collusion of the officer, or the mistake of the prosecutor, the fact laid varieth from the real fact, or cometh short of it in point of guilt.

Kel. 26. 52.  
Comb. 401.

This was frequently done before the revolution, and in one or two \* instances since. But this is not the present question.

1 Vent. 69.

Nor is the present question, Whether the court may discharge a jury sworn and charged, where undue practices appear to have been used to keep material witnesses out of the way; or where such witnesses have been prevented by sudden and unforeseen accidents.

2 Hale. 295,  
296, 297.

This likewise is not the question, and I give no opinion on it; only let it be remembered, that Lord Chief-Justice *Hale* justifieth this practice, which, he saith, prevailed in his time, and had long prevailed, by strong arguments drawn from the ends of government and the demands of publick justice.

Nor is it now a question, nor, I hope, will it ever be a question again, Whether in a capital case the court may, in their discretion, discharge a jury after evidence given and concluded on the part of the crown, merely for want of sufficient evidence to convict; and in order to bring the prisoner to a second trial, when the crown may be better prepared.

2 St. Tri. 827,  
828.

This was done in the cases of *Whitebread* and *Fenwick*, and it was certainly a most unjustifiable proceeding. I hope it will never be drawn into example.

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\* See *Ann. Hawkins's case*, *infra*, p. 38, 39. (And see p. 328.)

Nor is the present question, Whether the bare consent of the prisoner, unassisted by counsel, and consenting *to his own prejudice*, will render the court quite blameless in discharging a jury after evidence given on both sides and concluded.

This was done in the case of *Mansel*, which hath been cited 2 And. 105. at the bar : but I think it ought not to have been done ; for, notwithstanding what the record saith of the uncertainty and insufficiency of the verdict, the truth of the case was no more than this, The jury were not agreed on any verdict at all ; and therefore nothing remained to be done by the court, but to send them back, and to keep them together, till they should agree to such verdict as the court could have received and recorded : and the prisoner ought not to have been drawn into any consent at all ; for in capital cases I think the court is so far of counsel with the prisoner, that it should not suffer him to consent to any thing manifestly wrong, and to his own prejudice.

I thought proper to premise these things, in order to clear the present question of every consideration which I take to be foreign to it.

And now I will state what I take to be the present question : And that is,

Whether in a capital case, where the prisoner may make his full defence by counsel, the court may not discharge the jury upon the motion of the prisoner's counsel, and at his own request, and with the consent of the attorney-general *before evidence given*, in order to let the prisoner into a defence, which, in the opinion of the court, he could not otherwise have been let into.

And I am clearly of opinion, that a jury may in such a case be discharged ; and that the discharging the jury, under these circumstances, will not operate so as to discharge the prisoner from any future trial for the same offence.

It seems that an opinion did once prevail, that a jury, once sworn and charged in any criminal case whatsoever, could not be discharged without giving a verdict ; but this opinion is exploded in *Ferrar's* case, and it is there called a *common tradition*, which had been holden by many learned in the law. Ray. 34.

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My Lord *Coke* was one of those learned men who gave into this tradition, as far, at least, as concerneth capital cases; and he layeth down the rule in very general terms, in the passages which have been cited on behalf of the prisoners from his first and third institutes.

P. 267.

The same rule is laid down in *Hale's Summary of the Pleas of the Crown*; a very faulty incorrect piece, never revised by him, nor intended for the press.

But as his lordship in his *History of the Pleas of the Crown* justifieth the contrary practice, his authority is clearly on the other side of the question: and his authority is the more to be regarded, because he had seen and well considered the passages cited from Lord *Coke*; though I believe the rule, as it standeth in his summary, hath contributed not a little to the confirming many people in *Coke's* opinion.

My Lord *Coke* layeth down the rule in very general terms; but he hath not given us any of the principles of law or reason whereon he groundeth it. He hath indeed, in his first Institute, cited one, and but one authority in support of it, and that authority doth not, to my apprehension, in the least warrant it.

21 E. III. 18.

A man was indicted for larceny, and upon his arraignment pleaded not guilty, and put himself upon the country: and afterwards, when the jury was in court, he prayed the liberty to become an approver; and this was denied him; for when issue is joined, it ought to be tried. And he was tried and found guilty, and hanged.

This is the whole of that case. Here is not the least intimation given of any general principle, that a jury once sworn and charged cannot be discharged without giving a verdict; nor did the court, as I apprehend, go upon that principle. It went upon a principle quite different, a principle adapted solely to the case then before the court, which I shall mention presently.

Corone, 449<sup>a</sup>

Indeed *Fitzherbert*, who abridgeth this case, doth say, that the reason of the judgment was, that the inquest, having been once charged, could not be discharged; which possibly might induce Lord *Coke* to draw the same conclusion from that case.

†

But



But the reason given by *Fitzherbert* is not the reason given in the book. Nor doth it so much as appear by the book, that the jury was sworn; the words of the book are, "*Après quant l'enquest fuit icy,*" afterwards when the jury was here, or in court; whether sworn or not doth not appear by the book. But whether the jury was sworn or not, there was not the least occasion to resort to any general principle, *That a jury once sworn cannot be discharged*: because there was, as I hinted before, another rule at hand adapted to the case of an approver, which, I think, wholly governed that case.

And the rule was this; that a person who had once pleaded to issue could not after that be admitted to a confession in order to save his own life, by charging other persons supposed to be his accomplices in the same fact: for, by once solemnly denying the fact upon his arraignment, he had, in the opinion of those times, lost all credit, and so could not be received as an evidence against other people.

This rule is laid down by *Stanford*, and it prevailed for a long time: and it is observable, that *Brooke*, who abridgeth this very case, carrieth the reason the court went upon no farther than the law then went in the case of an approver; his words are, "A man was arraigned for felony and pleaded not guilty, and afterwards would have become an approver, and was not suffered, *because he had joined issue before.*" Not because the jury was sworn and could not be discharged, but because he had, on his arraignment, denied the fact.

Pl. Cor. 144. R.  
Bro. Corone, 42.

Thus then standeth the case with regard to the single authority cited by Lord *Coke*. The judgment did not go upon the general principle laid down by him and *Fitzherbert*, but upon a principle peculiar to the case of an approver.

It must be owned, that the judges did in after-times abate of their rigour with regard to the case of approvers; and did admit persons to the liberty of approving, not only after issue joined, but even after the jury was sworn and evidence in part given; but seldom after the evidence gone through and concluded; as appeareth from several instances mentioned by Lord *Hale*.

2 Hale 228.

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But

But then it must be owned, on the other hand, that whenever they did so, they went in flat contradiction to the general rule laid down by *Coke* and *Fitzherbert*.

I will only add, with regard to this point, that the admitting, or not admitting persons to become approvers, was always considered as a matter of *mere discretion* in the court; as a matter of grace, and not of right: and yet we see, that, in a matter of mere discretion, the court did frequently, upon the special circumstances of the case, discharge juries, after they were sworn and charged, and had in part heard the evidence.

These instances therefore must be considered as so many exceptions to the general rule; though, I confess, they do not come up to the case of discharging one jury, and bringing the prisoner to his trial by another.

But still they shew, that the rule now contended for on the part of the prisoners cannot be true in the latitude the words import: and, I think, they do in part shew, what I hinted in the beginning, that no general rule can govern the discretion of the court on this question in all possible cases and circumstances.

But this will appear in a stronger light in those cases where the circumstances of the prisoner appear on his trial to be such, as that the trial cannot proceed without manifest injustice to him.

A great variety of cases might be put upon this head: but as this is a point which ought to be treated with great caution, I think it safer to cite a case which I find stated to my hand, than to suppose and argue from any cases of my own.

1 Hale 335.

The case I mean is that put by Lord *Hale*, which was mentioned the last time at the bar.

“In case a man in a phrenzy happen by some over-sight to plead to his indictment and put himself on his trial; and it appeareth to the court, on his trial, that he is mad; the judge, in discretion, may discharge the jury of him, and remit him to gaol, to be tried after the recovery of his understanding.”

But without resorting to authorities in a plain case, the common sense and feeling of mankind, the voice of nature, reason, and revelation, all concur in this plain rule, *That no*

*man*

*man is to be condemned unheard*; and consequently no trial ought to proceed to the condemnation of a man who by the providence of God is rendered totally incapable of speaking for himself, or of instructing others to speak for him: and common sense will at the same time tell us, that the bare postponing a trial, under these circumstances, will not discharge the prisoner from a future trial, when his present disability shall be removed.

This case is surely an exception to any general rule that the wit of man can lay down on this point \*.

Another case, which I take to be an exception to the general rule contended for in behalf of the prisoners, is, when by the indulgence of the court, and the consent of the attorney-general, the trial of the issue goeth off after the jury sworn and charged; in order to intitle the prisoner to some advantage in point of defence, which in the rigour of the law he could not otherwise be intitled to.

And this, I apprehend, appeareth from the case of *Rookwood*, which also was cited at the bar. 4 St. Tr. 640.  
G.

In that case the jury was sworn and charged, and the indictment opened by the King's counsel. The prisoner's counsel then offered some exceptions to the indictment, apprehending, as they said, that since the act of 7th King *W.* declareth, that the exceptions therein mentioned shall not be taken *after evidence given*, the prisoner, by a favourable construction of the act, had liberty to take exceptions at any time *before* evidence.

The court was unanimously of opinion, that the prisoner's counsel had lapsed their time for taking any exceptions at all: that the proper time for taking exceptions is before issue joined, or at least before the jury sworn.

And yet it being a case of life, and on a new act of parliament, the court did agree that, in that instance only, the counsel should be at liberty, with the consent of the attorney-general, to take their exceptions; confining themselves to the exceptions mentioned in the act, of which they could not have the benefit in arrest of judgment.

The prisoner's counsel declined to enter into their exceptions under that restriction, and so the trial went on. But

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(\*) See the case of *Finnish Meadow*, p. 76.)

had exceptions under the restrictions of that act been taken and allowed, the indictment must have been quashed, and the jury then sworn and charged must have been discharged without giving a verdict.

Lord Chief-Justice *Holt* did not come readily into the expedient, proposed by the rest of the judges, of letting the prisoner's counsel into their exceptions, even with the consent of the attorney-general; and in the conclusion declareth, that the attorney could not consent to it, *unless he would also consent to discharge the jury.*

4 St. Tri. 666.

These are his words, as I have taken them from the printed trial. His lordship surely at that time entertained no doubt, that at the prayer of the prisoner and his counsel, and with the consent of the attorney-general, a jury sworn and charged in a case of high treason might be discharged. The other judges present (who were the Lord Chief-Justice of the Common Pleas, the Lord Chief-Baron, and four of the puisne Judges) must certainly be of the same opinion; otherwise they would never have given way to the taking of exceptions, which if they had been allowed must have ended in discharging the jury, and at the same time could not, in the nature of things, have operated, so as to discharge the prisoner from answering to another indictment for the same offence.

It is said, on the authority of a very short and imperfect note in *Cartbrow*, that, in less than two years afterwards, all the judges of *England* upon debate among themselves came to a resolution, that in capital cases a juror cannot be withdrawn, though all parties consent to it.

It was very properly asked by the counsel for the crown, Upon what occasion this debate among the judges was had? Whether any case was then depending in judgment before them which gave rise to the conference, and which was to be governed by this resolution, and what were the particular circumstances of that case, if any such there was? These questions, I say, were very properly asked: for the true extent of all rules of this kind, however generally they may be penned, is, and always will be, in a great measure, adjusted by the circumstances of the case under consideration at the time when the rule appears to be given.

It

. It seems, endeavours have been used to come at the necessary light in these particulars, but to no purpose: only it is said upon the authority of a MS. of a late learned judge, that this resolution, among others, was taken upon a conference among the judges in relation to an indictment against the then sheriffs of London for a bare misdemeanour; but what were the circumstances of that case, or what became of it doth not appear. And therefore, I freely own, this extrajudicial opinion (for with regard to capital cases it is extrajudicial) weigheth very little with me in the present question; and doth by no means shake the authority of *Rookwood's* \* case, which I take to be a case very nearly in point with the present, and moreover was a case where the point did judicially come before the court, and in which the court had the assistance of very able counsel on both sides of the question. Tracy.

The only difference between the cases is this; *Rookwood* could not have had the benefit of his exceptions without the indulgence of the court, and consent of the attorney-general; whereas the prisoners at the bar might, in my opinion, have had the full benefit of their point of law without either. I need not repeat what I said on this head the last time I spoke of this matter. But as a doubt arose on that point, the expedient now under consideration was thought of. This expedient the court came into at the prayer of the prisoners and their counsel, and with the consent of the attorney-general.

Not to bring the prisoners' lives twice in jeopardy, (which is one great inconvenience of discharging juries in capital cases,) but merely in order to give them one chance for their lives, which, *it was apprehended*, they had lost by pleading to issue.

Nor was it done to postpone their trials to an unreasonable distance, when their witnesses might be dead, or wearied out by a long and expensive attendance, (which is another great inconvenience which may attend the discharging of juries at discretion, and was an ingredient of great hardship in the cases of *Whitebread* and *Fenwick*;) but in order to bring them to a trial with all the speed that might be, in case their plea

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\* See *Holt's* and *Tracy's* opinion in 1704, in the case of *Anne Hawkins*, at the end of this case. p. 38, 39.

## THE REPORT.

should be over-ruled: and accordingly they were tried the very next day, as soon as judgment was given on their plea.

Upon the whole, my opinion is, that all general rules, touching the administration of justice, must be so understood, as to be made consistent with the fundamental principles of justice: and consequently all cases where a strict adherence to the rule would clash with those fundamental principles are to be considered as so many exceptions to it. The cases I have mentioned, and many others which might be mentioned, are exceptions to the general rule insisted on in behalf of the prisoners.

The case at bar is, I think, an exception to that rule; and at the same time standeth clear of the inconveniences mentioned by the prisoners' counsel.

The discharging the jury in this case was not a strain in favour of prerogative; it was not done to the prejudice of the prisoners; on the contrary it was intended as a favour to them.

In that light, I say, it was considered by the court; in that light it was considered by the prisoners and their counsel, and accordingly they prayed it; and in that light Mr. Attorney-general, with his usual candour, consented to it.

And in that light I know of no objection in point of law or reason to it. And therefore I am of opinion that judgment ought not to be arrested.

Mr. Justice Tracy's MS. having been cited in the foregoing case by the prisoners' counsel and taken some notice of by the court, I think it not amiss to subjoin from *the same MS.*, which I had not then seen, a report of the following case.

Prisoners;

“ At the sessions at the *Old Bayly* before *Easter* term 1704,  
 “ *Anne Hawkins* was indicted for breaking the mansion-house  
 “ of *Samuel Story* in the night-time. It appeared on evidence,  
 “ that the house belonged to the *African* company, that *Story*  
 “ was an officer of the company, and that he and many other  
 “ persons as officers of the company had separate apartments in  
 “ the house, in which they inhabited and lodged; and that the  
 “ apartment

"apartment of *Story* was broke open. It was holden by *Holt* chief-justice, *myself*, and Baron *Bury*, That the apartment of *Story* could not be called *his* mansion-house; becaufe he and the others inhabit in the house merely as officers and servants of the company : and thereupon *the jury was discharged of this indictment, and it was amended*, and laid to be the mansion-house of the company."

(See Kel. 27.  
1 Hale, 522.  
557. Leach 267.)

The record hath been looked into. It warranteth the report of the learned judge in the substantial parts of it, though in some points it is defective. Two bills were in fact preferred against the woman, the first for burglary and larceny in the dwelling-house of *Samuel Story*, to which she pleaded and put herself upon the country. The second for burglary and larceny in the mansion-house of the *African* company, in which she is charged to have committed the burglary upon the *same day*, and to have stolen the *very same goods* as in the former bill.

It appeareth upon this second bill, that she was acquitted of the burglary and found guilty of the larceny; but it doth not appear by any entry on the first, that the court proceeded on it farther than the receiving and recording her plea, and remanding her to *Newgate*; probably till the second amended bill could be prepared and sent to the grand jury. But certainly it is more reasonable to impute this defect to the neglect of the officer who omitted to make the proper entry, than to imagine that the learned judge was totally mistaken in a plain matter of fact, falling within his own knowledge.

Another circumstance which may beget some doubt might be, and probably was, owing to *mere accident*. The first bill is now found upon the file among the indictments of the then next preceding sessions [*March 8th, 1703.*] But it ought to be remembered, that neither *Holt*, *Tracy* nor *Bury* attended at that time; and that it appeareth by the record that they all did attend at the following sessions; at which time, according to the judge's report, the point came under consideration upon evidence given on the first bill, and the second amended by the direction of the court was preferred.

The Case of Mr. Charles Ratcliffe, Michaelmas  
20 Geo. II. in the King's Bench.

(1 Will. 155.)

A person attainted of treason escapes, and is retaken.

HE was concerned with his brother, the late earl of *Derwentwater*, in the rebellion of 1715; and in May 1716 was convicted and attainted of high treason before special commissioners of oyer and terminer pursuant to the act of the first of the late king. While he was under sentence of death, and probably before the act of general pardon of the third of the late \* king passed, he made his escape out of *Newgate*, and got over to *France*.

At the latter end of the year 1745 he was, with some other officers, *French*, *Scotch* and *Irish*, taken on the coast on board a *French* ship of war, which was loaden with arms, ammunition and other warlike stores, bound, as was supposed, for *Scotland*; where the rebels were at that time in arms.

On Friday the 21st November 1746, he was brought to the bar by virtue of a *habeas corpus* directed to the constable of the Tower or his deputy; and the record of his conviction and attainder was at the same time removed thither by *certiorari*.

The *habeas corpus* with the return, and also the *certiorari* and record of the conviction and attainder being read, the substance of the record was opened to him in *English* by the secondary on the crown side; who then asked him what he had to say why execution should not be done upon him according to the judgment. He prayed, that counsel might be assigned him, and named Mr. *Ford* and Mr. *Fodrell*; who were accordingly assigned his counsel.

They prayed a few days time, that they might have an opportunity of knowing from the prisoner himself the truth and merits of his case; which was granted.

They also prayed a copy of the record; which was denied them. But the officer, by the direction of the court, read over the indictment a second time very distinctly, and the

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\* See the 45th sect. of the act.



prisoner's counsel took notes of it; and the prisoner was ordered up on *Monday* next.

His counsel moved for a rule of court, that they might have access to their client at all seasonable times. But his solicitor admitting that he had obtained a warrant from a secretary of state to the same purpose, the court did not make any rule in the case, nor did the counsel press it; but the court declared, that if the secretary's warrant had not been obtained, they would have made such rule; for the prisoner is now the prisoner of this court; and the lieutenant of the Tower is, as far as concerneth the prisoner's case, a minister of this court, and subject to the rules of it.

*November 24, 1746.*

The prisoner was brought to the bar, and being again arraigned he, *ore tenus*, pleaded, That he is not the person mentioned in the record before the court. The attorney-general, *ore tenus*, replied, The prisoner is the same *Charles Ratcliffe* mentioned in the record, and this I am ready to verify; and issue was joined.

He pleads, that he is not the person.

The prisoner's counsel pressed strongly to put off the trial of this issue, upon an affidavit of the prisoner, which was sworn in court, that two material witnesses named in the affidavit are abroad; one of them at *Brussels*, and the other at *Saint Germain*; and that he believeth they will attend the trial if a reasonable time be allowed for that purpose. But the court refused to put off the trial, and a *venire* was awarded returnable *instantèr*: For, said the court, this proceeding is in nature of an inquest of office, and hath always been considered as an instantaneous proceeding, *unless proper grounds for postponing the trial be laid before the court*. It was so considered in the case of *The King against Barkstead and others* upon the same issue as this is. A *venire* was awarded, and a \* jury returned and sworn *instantèr* to try that issue. It was so considered likewise in the case of *The King against Roger Johnson* in this court, *Michaelmas* the second of this King.

Kel. 13.  
1 Lev. 61.  
1 Sid. 72.

If Mr. *Ratcliffe* hath any thing to offer which may give the court reasonable grounds to believe, that his plea is any thing

\* See the record *inf.* in Dr. *Cam. rot's* case, p. 111.

† See a report of the case, p. 46. (See also 4 *Black. Append. f. 3.*)

more

more than a pretence to delay execution, we are ready to hear him ; the single issue is whether he be or be not the person mentioned in this record ; this is a fact well known to him ; and if he is not the person, he might, if he had pleased, have made that matter part of his affidavit ; he may do so still if he can do it with truth ; and if he refuseth to give the court this satisfaction touching the truth of his plea, the court doth him no manner of injustice in denying him the time he prayeth.

S. P. C. 163.  
Co. L. 157. b.

As the jurymen were called to the book, the prisoner challenged one of them, and insisted on his right to a peremptory challenge ; but his challenge was over-ruled. For though there are some opinions in the books that in collateral issues of this kind the prisoner hath a peremptory challenge, yet the later and better opinion is that he hath not ; and the modern practice hath gone accordingly.

2 Hale 167.

2 Lev. 67.  
2 Keb. 144.

Chief-Justice *Hale* saith, That in case of an issue joined on error in fact assigned for reversing an outlawry, the prisoner hath no peremptory challenge ; and in p. 378. of the same book it seemeth to be admitted as a general rule, that in inquests of office (and the present trial is in nature of an inquest of office) the prisoner hath no peremptory challenge. In *Barkhead's* case, cited before, the prisoners were not permitted to challenge peremptorily ; and in the case of *Roger Johnson*, which hath likewise been already cited, the court declared, that the prisoner had no peremptory challenge.

The jury being sworn to try the issue, the indictment was read over to them in *English* for their information as to the name and addition of the prisoner ; and the evidence being concluded, the jury withdrew for a few minutes, and then returned with their verdict, that the prisoner at the bar is the same *Charles Ratcliffe* that is mentioned in the record.

*Note.* The prisoner during the trial of this issue had the assistance of his counsel ; who cross-examined the King's witnesses, and observed fully upon the evidence.

After the verdict was brought in, the prisoner's counsel took notice of the Act of General Pardon passed in the third of the late King ; and said that POSSIBLY their client might upon consideration be found to be intitled to the benefit of it ; and concluded

concluded with a motion, that the court, before they award execution, would give them some time to consider the act, and to be informed by their client touching the circumstances of his case; that they might be able to submit his case to the opinion of the court, how far he is, or is not intitled to the benefit of the act.

But the court declared, that the prisoner having once pleaded in bar of execution, and that plea having been falsified by the verdict, his plea is peremptory, and the verdict conclusive; and nothing now remaineth but for the court to award execution.

Mr. Justice *Foster* was satisfied, that the principle the court went upon is a good general rule; but he thought it not universally true. He considered the case of a parliamentary pardon as an exception to it; for surely the court will never, in any state of a cause, award execution upon a man who plainly appeareth to be pardoned; and therefore he thought, that if any person, whether as counsel for the prisoner or as *amicus curiæ*, will now shew that the prisoner is intitled to the benefit of the act, he ought to be heard. But to this it was answered by the Chief-Justice, that the Act of Pardon containing many exceptions both as to persons and crimes, the party who would take the benefit of it must plead it specially with all proper averments; so as to shew that he is not within any of the exceptions, according to the resolution in the Earl of *Salisbury's* *Carth.* 131. case.

The counsel for the crown did not urge either of these points against the prisoner; and I have been since informed, that, in favour of life, they were determined to wave them; and were provided with evidence then attending in the Hall to prove (which was the truth of the case) that the prisoner after his attainder made his escape out of *Newgate*, which brought him within the exception in the 45th section of the act. And the prisoner's counsel being apprized of this by the counsel for the crown, in a conversation between them at the bar, thought it in vain to press their motion any farther. And execution was accordingly awarded; and a rule made, that it be done on *Monday* the 8th of *December*; and a writ was ordered to the lieutenant of the Tower to deliver the prisoner

soner to the sheriff of *Middlesex* on that day; and another to the sheriff to receive him, and to cause execution to be done.

*N. B.* Since the prisoner's counsel, after sufficient time allowed them to inform themselves of the true state of his case, had nothing to offer to induce the court to think that their client was intitled to the benefit of the act, only that POSSIBLY upon farther consideration he may appear to be so intitled; there was certainly no room to delay the awarding execution upon so slight a suggestion from the bar; and Mr. *Ratcliffe* had no injustice done him in that respect.

He was beheaded on *Tower-hill* on the day mentioned in the rule.

Cra. Jac. 495.  
Hutt. 27.

The award of execution in Mr. *Ratcliffe's* case was agreeable to the precedent in the case of Sir *Walter Raleigh*. He was convicted and attainted at *Winchester* before special commissioners, and being brought into the King's Bench by *habeas corpus*, execution was there awarded on the former judgment; judgment not being pronounced afresh, it having been pronounced before.

1 H. VII. 23,  
24, 25.  
1 Lev. 67.  
1 Sid. 72.

In the cases of *H. Stafford*, and of *Barkstead, Okey* and *Corbet*, who were attainted by act of parliament, the tenour of the acts was removed by *certiorari* into Chancery, and sent thence by *mittimus* into the King's Bench; and the Chief-Justice pronounced the usual judgment as in cases of high treason.

There was no proceeding of this kind in the case of the Duke of *Monmouth*, who was attainted by act of parliament, 1 Ja. II.; for the action at *Sedgemoor* happened on the 8th of July 1685, which in that year fell out to be the last day of *Trinity* term; and on the 15th he was executed. But that was a time of great heat and violence, and few things then done ought to be drawn into example.

1 W. & M.  
Sess. 1. C. 10.

*N. B.* The act of the 3d of the late King giveth the party liberty to take advantage of it on the general issue without specially pleading the same; and so doth that on which the Earl of *Salisbury* relied. The court therefore could not in the Earl's case ground itself on the rule of pleading laid down in *Cartwright*; though the rule might possibly be mentioned *obiter* by

by some of the judges. I think the true ground the court went upon, which indeed the reporter himself seemeth to hint at, but very darkly, was that the Earl having been committed by the House of Peers upon an impeachment by the Commons for high treason, this court cannot allow him the benefit of the act; it hath no cognizance of the crime he standeth charged with; the matter lieth before another and higher judicature, and thither his Lordship must resort.

And there he afterwards had the full benefit of the act without being put to plead it; for on the 2d of *October* 1690, upon reading the Earl's petition, setting forth that he had been long a prisoner in the Tower *notwithstanding the late act of free and general pardon*, and praying to be discharged, the Lords ordered the judges to attend on the *Monday* following to give their opinions, whether the Earl be pardoned by the said act; on the 6th the judges delivered their opinions, That if his offences were committed before the 13th of *February* 1688, and not in *Ireland*, or beyond the seas, he is pardoned. Whereupon it was resolved, that he be admitted to bail; and the next day he was bailed, and on the 30th of *October* † he and his sureties were discharged from their recognizances.

The rule laid down in *Carthew* from *Plowden* is laid down in the same latitude in many of the old books. But it is to be observed, that the acts of general pardon in those times had no clauses enabling the party to avail himself of the pardon on the general issue without specially pleading the same. The first act which hath that clause, that I have met with, is the act of Oblivion (12th *Car.* II.), and all acts of general pardon since that time have had clauses to the same purpose.

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† See the Journals of the Lords.

*Michaelmas, 2 Geo. II. B. R.*

The Case of *Roger Johnson*, cited twice in Mr. *Ratcliffe's Case*, was thus.

An outlaw for treason is taken.

THE defendant stood outlawed upon an indictment for high treason in diminishing the current coin of the kingdom, and was taken and committed to *Newgate*. Being now brought to the bar by *habeas corpus*, he offered to surrender himself to the Chief-Justice, pursuant to the act of the 5th and 6th E. VI. c. 11. (being within the year) and to traverse the indictment; alledging that he was at *Flushing* beyond the seas at the time the outlawry was pronounced.

The Chief-Justice said, We cannot refuse to accept his surrender; he must be remanded to *Newgate*; and let a special entry be made that he offered to surrender, and to traverse the indictment \*.

At another day in the same term the defendant was again brought to the bar, and he tendered a plea in parchment, "That he was out of the realm on the 8th of *February* when "the outlawry was pronounced," and pleaded over to the treason; which plea was received. The attorney-general prayed, that he might have a copy of the plea, and three days time to demur or join issue; which was granted; the court declaring that the attorney might have joined issue *instantèr*; and that on the trial of such issue the prisoner could not challenge any of the jury without cause. The prisoner prayed counsel; and had four assigned.

He pleads, that he was beyond sea.

At another day in the same term the prisoner being at the bar, by leave of the court, withdrew his plea; and pleaded the substance of it, *viz.* his being beyond sea on the 8th of *February, ore tenus*. The attorney-general *ore tenus* replied, "I say he was within the realm on the 8th of *February*, "and I traverse his being then out of the realm." Issue being thus joined, the court awarded a *venire* returnable *instantèr*, and the sheriff, sitting the court, returned a jury.

\* This justice was refused to Sir *Thomas Armstrong* in a like case. *Vide* 3 *Mod.* 47. and 3 *St. Tri.* 895.

Then

Then the prisoner's counsel opened the plea and case, and called their witnesses; and the attorney-general insisting that the witnesses should be examined apart, they were so examined; as likewise were the witnesses produced on the part of the crown.

The prisoner's counsel managed the whole in his behalf, and three of them were heard on the reply; and the jury, after a short recess, returned with their verdict, "That the prisoner was out of the realm on the 8th of *February*."

Then the prisoner was arraigned on the indictment, to which he pleaded not guilty; and the attorney joined issue, and prayed a *venire* returnable the first return of the next term; which the court awarded; and the prisoner was remanded to *Newgate*.

This note of *Johnson's* case was communicated to me by my good friend the late Mr. Justice *Abney*. The case is reported by Serjeant *Barnardiston* \* in his first volume, and by Sir *John Strange* †.

\* P. 79, 90, 92,  
95, 102, 111,  
123.  
† P. 824.

*Hilary*, 20 Geo. II.

### The Case of *John Murray of Broughton*.

PLEAS before our Lord the King at *Westminster* of *Hilary* term in the twentieth year of the reign of our Sovereign Lord *George* the second, by the grace of God of *Great Britain, France and Ireland* King, defender of the faith.

A person st-  
tainted of trea-  
son by act of  
parliament.

Amongst the pleas of the King Roll.

ENGLAND. Our present Sovereign Lord the King hath transmitted to his beloved and faithful Sir William Lee, knight, and his associates, justices of our said present Sovereign Lord the King, assigned to hold pleas before the King himself, his writ of mittimus, together with a writ directed to the clerk of his parliaments, and the return made to the same; and also the record of a certain act of parliament of our said present Sovereign Lord the King made at *Westminster* closed in these words: To our beloved and faithful Sir William Lee, knight, and others his associates, our justices assigned to hold

The writ of  
mittimus.

*bold pleas before us, greeting: We send you inclosed in these presents the tenour of a certain writ of certiorari directed to our beloved Ashley Cowper, esqr. clerk of our Parliaments, together with the return indorsed upon the back of the said writ; and also the tenour of a certain act whereof mention is made in the same writ, intituled, An Act to attain Alexander Earl of Kellie [the persons intended to be attainted are here named, among whom Mr. Murray is one] of high treason, if they shall not render themselves to one of his Majesty's justices of the peace on or before the twelfth day of July in the year of our Lord 1746, and submit to justice. The tenour of which said act we for certain reasons have caused to be brought before us into our Chancery; and we do hereby command you, that having inspected the tenour of the said act, you farther cause to be done thereon that which of right, and according to the law and custom of England, you shall see fit to be done. Witness ourself at Westminster the tenth day of February in the twentieth year of our reign. The tenour of the said writ of certiorari, and the return made to the same, and also the tenour of the said act in the said writ mentioned, follow in these words; George the second, by the grace of God of Great Britain, France and Ireland King, defender of the faith, to our beloved Ashley Cowper, esquire, clerk of our Parliaments, greeting; We being willing (for certain reasons) to be certified concerning the tenour of a certain act by us made and enacted, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in Parliament assembled at Westminster, the seventeenth day of October in the nineteenth year of our reign, intituled, An act to attain Alexander Earl of Kellie [names repeated] of high treason, if they shall not render themselves to one of his Majesty's justices of the peace, on or before the twelfth day of July in the year of our Lord 1746, and submit to justice, Do command you that immediately after the receipt of this writ, you do distinctly and openly send before us into our Chancery the tenour of the said act, with all things touching the same, as fully and perfectly as the same now remaineth in your custody, together with this writ. Witness ourself at Westminster, the seventh day of February in the twentieth year*  
*of*

Certiorari.



of our reign. The execution of this writ appeareth in a certain schedule to this writ annexed as within I am commanded. Ashley Cowper cler' parliamentor'. In the Parliament held at Westminster the seventeenth day of October in the year of our Lord 1745, and in the nineteenth year of the reign of our Sovereign Lord GEORGE the second, by the grace of God of Great Britain, France and Ireland King, Defender of the Faith, and there continued by several adjournments until and unto Wednesday the fourth day of June 1746, by the consent of the Lords as well spiritual as temporal, and of the Commons, and by the consent of the King's Majesty then present, the following statute (amongst others) was ordained, enacted and established, (to wit) *An act to attain Alexander Earl of Kellie [names repeated] of high treason, if they shall not render themselves to one of his Majesty's justices of the peace on or before the twelfth day of July in the year of our Lord 1746, and submit to justice. Whereas Alexander Earl of Kellie [names repeated] on or before the eighteenth day of April in the year of our Lord 1746 did in a traiterous and hostile manner take up arms and levy war against his present most Gracious Majesty within this realm, contrary to the duty of their allegiance, and are fled to avoid their being apprehended and prosecuted according to law for their said offences; Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons in this present parliament assembled, and by the authority of the same, That if the said Alexander Earl of Kellie [names repeated] shall not render themselves to one of his Majesty's justices of the peace on or before the 12th day of July in the year of our Lord 1746, and submit to justice for the treasons aforesaid, then every of them the said Alexander Earl of Kellie [names repeated] not rendering themselves as aforesaid, and not submitting to justice as aforesaid, shall from and after the said eighteenth day of April in the year of our Lord 1746 stand and be adjudged attainted of the said high treason to all intents and purposes whatsoever, and shall suffer and forfeit as a person attainted of high treason by the laws of the land ought to suffer and forfeit; and every of the said justices of the peace*

The return.

The title of the act.

The Act.

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*are hereby required to commit every of them the said Alexander Earl of Kellie [names repeated] so surrendering himself to prison for the said high treason, there to remain until he shall be discharged by due course of law, and thereof immediately to give notice to one of his Majesty's principal Secretaries of State. I Ashley Cowper clerk of parliaments, by virtue of the writ of our Lord the King of certiorari to me directed, and to these presents annexed, do certify that what is above written is the true tenour of the act of parliament abovesaid in that writ expressed. In witness whereof to this schedule I have set my seal, and subscribed my name, dated the ninth day of February in the twentieth year of the reign of our said Lord the King, and in the year of our Lord 1746.*

Mr. Murray being brought to the bar by *habeas corpus* directed to the lieutenant of the Tower, the foregoing record was read to him by the secondary on the crown side; and the attorney-general prayed that execution might be awarded. The secondary then demanded of him what he had to say why execution should not be awarded.

The prisoner *ore tenus* pleaded, that he did surrender himself to the Lord Justice-Clerk of Scotland (who is a justice of the peace) at *Edinburgh* the 28th of *June* last. Whereupon the attorney-general declared, that he had authority from his Majesty to confess the truth of the prisoner's plea, and did accordingly confess it. And the court ordered the prisoner's plea, and the attorney-general's confession, to be recorded; and that the attorney take nothing by his motion, and that the prisoner be remanded.

*Note.* This gentleman was made use of as an evidence against Lord Lovat on his impeachment: and it was suggested on that occasion, that the attorney's confessing the truth of the plea, by warrant from his Majesty, was a strain of prerogative, calculated to elude the force of the act of attainder, and to serve the turn of making Mr. Murray an evidence. But whoever considereth, that he was actually brought before the Lord Justice-Clerk on the 28th of *June* (fourteen days before the time limited by the act for his surrendering was expired) and was the same

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same day by him committed to the castle of *Edinburgh*, where he was kept close prisoner till he was removed to the Tower; whoever considereth this must admit, that, with whatever view he might be brought up at this time, he had merely that justice done him now by his Majesty's order, which at one time or other, whenever he should have been brought up on the foot of the act of attainder, could not be denied him.

The intent of the act was answered by his being made amenable to justice before the time limited for his surrender: and he being kept close prisoner till the day for surrendering was past, it was put out of his power to comply strictly with the letter of it; and therefore his noncompliance ought not to be fatal to him \*.

See *Roger Johnson's case* before, p. 46.

*Pasch. 20 Geo. II. B. R.*

The Case of *John Harvey*.

**P**LEAS before our Lord the King at *Westminster* of *Easter* term, in the twentieth year of the reign of our Sovereign Lord *GEORGE* the Second, by the grace of God of *Great Britain, France and Ireland* King, defender of the faith.

(1 Writ. 164.  
4 New Abr.  
567.)

A person attainted of felony by act of parliament.

Amongst the pleas of the King Roll.

*Middlesex.* Our present Sovereign Lord the King hath sent to his keeper of his gaol of *Newgate* his writ closed in these words (that is to say) *GEORGE* the second, by the grace of God of *Great Britain, France and Ireland* King, defender of the faith, To the keeper of our gaol of *Newgate*, Greeting; We command you that the body of *John Harvey*, being committed and detained in our prison under your custody (as it is said), together with the day and cause of the taking and detaining of him, by whatsoever

*Habeas corpus.*

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\* I have been informed, that Mr. *Murray* was now brought up in order to obviate an objection that might have been made to his evidence upon the authority of Lord *Duffus's* case, reported in *Com. 44b*. But that case differeth from this. Lord *Duffus* was not amenable to justice before the expiration of the time given by the act; nor, merely through his own default, could be. But I doubt Lord *Duffus's* case favoured too much of the *jummam* just.

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Return.

name the said John Harvey may be called therein, you have immediately after the receipt of this writ before us at Westminster, to undergo and receive all and singular such things as our said court shall then and there consider of concerning him in this behalf, and that you then have there this writ. Witness Sir William Lee knight, at Westminster, the twenty-seventh day of May, in the twentieth year of our reign. And now (that is to say) upon Saturday next after the morrow of the Ascension of our Lord in this same term, before our said present Sovereign Lord the King at Westminster, cometh Richard Akerman gentleman, his Majesty's keeper of his said gaol of Newgate, and returneth the said writ as followeth: The execution of this writ appeareth in a certain schedule to this writ annexed, The answer of Richard Akerman keeper of his Majesty's gaol of Newgate within mentioned. I Richard Akerman gentleman, keeper of his Majesty's gaol of Newgate, in the writ to this schedule annexed mentioned, do most humbly certify and return to our most serene Sovereign Lord the King, that before the coming to me of the said writ (to wit) on the twenty-first day of April in the year of our Lord 1747, the said John Harvey, in the said writ mentioned, was committed to my custody, and is now detained in the same, by virtue of a warrant under the hand and seal of Thomas Burdus esquire, one of the justices of our said present Sovereign Lord the King assigned to keep the peace of our said present Sovereign Lord the King in and for the county of Middlesex, and also to hear and determine divers felonies, trespasses, and other misdemeanours committed within the same county; which said warrant is in these words and figures following: Middlesex, to wit, To the keeper of his Majesty's gaol of Newgate. Receive into your custody the body of John Harvey of Pond-hall in the county of Suffolk, farmer, being a person, amongst others, armed with fire-arms and other offensive weapons, after the twenty-fourth day of July 1746, assembled in order to be aiding and assisting in the running, landing, or carrying away prohibited or uncustomed goods, and being, by his Majesty's order in council of the fifteenth of January last published in the London Gazettes of the 17th and 20th of that month, required, amongst others, to surrender themselves

*selves within the space of forty days after the first publication thereof in the London Gazette, to the Lord Chief-Justice, or one other of his Majesty's justices of the court of King's Bench, or to any of his Majesty's justices of the peace: and the said John Harvey not having surrendered himself in obedience to the above-mentioned order, but having been apprehended, taken, and brought before me one of his Majesty's justices of the peace for the county of Middlesex, by Thomas Hales gentleman, one of the officers or assistant officers to his Majesty's commissioners of the customs; and the said John Harvey being, by reason of his not surrendering himself pursuant to the said order, but neglecting or refusing so to do, by virtue of the statute in that case made and provided, adjudged, deemed, and taken to be convicted and attainted of felony, and to suffer pains of death as in cases of a person convicted and attainted by verdict and judgment of felony without benefit of clergy, the said offence being charged to have been committed in England; these are therefore to require you to receive into your custody in the said prison the body of the said John Harvey, and him there safely keep, until he shall be from thence discharged by due course of law. Given under my hand and seal this 21st April 1747. Thomas Burdus, (L. S.) And this is the cause of the taking and detaining of the said John Harvey, whose body I have ready before our said present Sovereign Lord the King at the time and place within-mentioned, as by the said writ I am commanded. And at the same time before our said present Sovereign Lord the King at Westminster cometh Sir Dudley Ryder knight, attorney-general of our said present Sovereign Lord the King, and in the presence and hearing of the said John Harvey in the said above-recited writ and return named, being now brought to the bar here in his own proper person under the custody of the said keeper of his Majesty's said gaol of Newgate (into whose custody he the said John Harvey had been before committed for the cause aforesaid in manner aforesaid) he the said attorney-general of our said present Sovereign Lord the King, for our said present Sovereign Lord the King, saith, That since the 24th day of July which was in the year of our Lord 1746, (to wit) upon the twelfth day of January in the twentieth year of the reign of our said pre-*

*Suggestion by  
the Attorney-  
general.*

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*sent Sovereign Lord George the second, by the grace of God of Great Britain, France and Ireland King, defender of the faith, and so forth, at the parish of Saint Paul Covent-garden in the county of Middlesex, it was in due manner charged before Thomas Burdus esq. one of his Majesty's justices of the peace of and for the county of Middlesex, assigned to keep the peace of our said present Sovereign Lord the King within and for the said county of Middlesex, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed within the same county, by information of Thomas Jones, a credible person, upon oath by him subscribed, that he the said John Harvey in the said writ and return named, and several other persons to the number of three and more, being armed with fire-arms and other offensive weapons, since the twenty-fourth day of July which was in the said year of our Lord 1746, (to wit) upon the eighth day of October in the twentieth year aforesaid, were assembled at Beauacre in the county of Suffolk, in order to be aiding and assisting in the running, landing, and carrying away uncustomed goods; And the said attorney-general of our said present Sovereign Lord the King farther saith, That he the said Thomas Burdus did forthwith (to wit) on the said twelfth day of January, at the parish of Saint Paul Covent-garden, certify under his hand and seal, and return the said information so made and given before him as aforesaid, to the most noble Thomas Holles Duke of Newcastle, one of his Majesty's principal secretaries of state, who did, as soon afterwards as conveniently might be (to wit) upon the fifteenth day of the same month of January in the twentieth year aforesaid, at the parish of Saint Paul Covent-garden aforesaid, lay the same before his Majesty in privy council, and that his Majesty did, at the same time and place last mentioned, thereupon make his order in his privy council, thereby requiring and commanding the said John Harvey (amongst others in the said order particularly named) to surrender himself within the space of forty days after the first publication thereof in the London Gazette, to the Lord Chief-Justice, or one other of his Majesty's justices of the court of King's Bench, or to any other of his Majesty's justices of the peace; which said order the clerks of his Majesty's privy council did cause to be forth-*

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with

with printed and published in the two next successive London Gazettes, and upon the said fifteenth day of January cause the same to be forthwith transmitted to the sheriff of the said county of Suffolk; which said sheriff did, within fourteen days after the receipt thereof, cause the same to be proclaimed between the hours of ten in the morning and two in the afternoon, in the respective market-places upon the respective market-days of two market-towns in the same county of Suffolk, the said two market-towns being near to the place where the said offence was charged to have been committed as aforesaid; and that a true copy of the said order was likewise within the said fourteen days affixed up upon a publick place in each of the said two market-towns, according to the directions and agreeably to the true sense, intent and meaning of the statute in that case lately made and provided: And the said attorney-general of our said present Sovereign Lord the King, for our said present Sovereign Lord the King farther saith, That the said John Harvey did not surrender himself pursuant to his Majesty's said order so made in his privy council as aforesaid, but did neglect so to do; by reason whereof he the said John Harvey in the said writ and return named is and standeth convicted and attainted of felony pursuant to the statute in that case made and provided: And all these matters and things he the said attorney-general of our said present Sovereign Lord the King, for our said present Sovereign Lord the King, is ready to verify and prove as the court shall award. Wherefore he prayeth in the behalf of our said present Sovereign Lord the King, that the said court here would proceed to award execution against him the said John Harvey for the felony aforesaid, according to the directions of the said statute.

This proceeding was grounded upon the statute of the 19th of the King: the substance of which, as far as concerneth the present case, is set forth in the suggestion on the roll. A doubt was made at the bar, whether it was necessary to suggest the several matters on the roll in the manner they are suggested, in order to ground a prayer for execution.

The court declared, that it is certainly necessary that those matters should be suggested on the roll. They are the several

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steps which the act requireth to be taken by the crown, in order to bring the prisoner under an attainder: and he may traverse all or any of them. Indeed when prisoners are attainted by name, which was the case of Mr. *Murray* last term, a transcript of the act of attainder is sufficient whereon to ground a prayer for execution. But here is a general law which, it is presumed, affecteth the prisoner at the bar; but he will not be affected by it, unless the several requisites mentioned in the act have been complied with in his case; and if he traverseth all or any of them, the *onus probandi* lieth on the crown.

Mr. *Ford* (assigned counsel for the prisoner) took an exception to the suggestion, that the proclaiming the prisoner in two market-towns was not set forth with sufficient certainty; because the names of the market-towns were not set forth; so that the prisoner could not give a particular answer to that part of the suggestion, nor come properly prepared with his proofs when the issues shall come to be tried\*.

But the court was of opinion, that if the prisoner would take advantage of the insufficiency of the suggestion, he must demur. He cannot take advantage of it on motion. If he pleadeth, he must do it *instantè* and *ore tenus*. There can be no inconvenience in his pleading *instantè*, if he intendeth to put the proof of *all* the matters suggested on the roll upon the crown.

Then the prisoner by advice of his counsel said, "I deny all the facts averred in the suggestion;" and the attorney-general replied, "I aver that all the facts alledged in the suggestion are true." And the prisoner was remanded: and, at the prayer of the attorney-general, *Monday* the 22d *June* was appointed for the trial of the several issues, and a *venire* was awarded on the roll for that day.

Mr. *Ford* on behalf of the prisoner moved for a copy of the suggestion, but that was denied. However the court told him it should be read again if he pleased, which Mr. *Ford* declined.

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\* *N. B.* The suggestions grounded on this act of parliament, which have been proceeded upon since this case of *Harvey*, have generally set forth the market-towns by name, which is undoubtedly the best way, for the reasons suggested by Mr. *Ford*.



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On the 22d June (*Trinity 21 Geo. II.*) the prisoner being brought to the bar, the jury was called and sworn to try the several issues joined between the King and the prisoner; and the suggestion was read by the secondary on the crown-side for the information of the jury, and they were by him charged to inquire of the several facts alledged in the suggestion, on which issues had been joined: and the junior counsel for the crown having opened the suggestion, the attorney-general went into the proof of the several issues.

The several facts touching the laying the information before Mr. *Burdus* against the prisoner and others; his certifying it in due manner to the Duke of *Newcastle*; his grace's laying it before the King in council; the order of council (which was produced under the seal of the council) requiring the prisoner and others to surrender within forty days after publication in the *London Gazette*; the transmitting this order to the printer of the *Gazette*; the publication of it in due time in two successive *Gazettes*, and the transmitting it to the sheriff of the county of *Suffolk*, in order to it's being proclaimed and published as the act directeth, were well proved.

Then the under-sheriff of *Suffolk* and other witnesses were called to prove the proclaiming and fixing up the order in two market-towns near *Beauacre*, the place where the fact is charged in the information taken by Mr. *Burdus* to have been committed: and it appeared on their evidence, that it was proclaimed and fixed up at *Ipswich*, which is thirty miles from *Beauacre*; at *Hadly*, which is forty-two miles from *Beauacre*; and at *Leosloff*, which is five miles from *Beauacre*, and at no other places; and that there are five or six market-towns nearer to *Beauacre* than *Ipswich*; particularly *Southwold* five, and *Beacles* eight miles.

Mr. *Ford* on behalf of the prisoner insisted, that the act hath not been complied with; the act indeed doth not say, that it shall be in the next market-towns, but still it must be in the market-towns near the place; and the distance of thirty miles cannot with any propriety be called near, when it appeareth by the evidence of witnesses on the part of the crown, that there are at least three market-towns

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towns within a third part of that distance. And of this opinion was the court.

: This, said they, is a very penal law, and we are in a manner in an untrodden path, and therefore must walk with great caution. What we do in this case, which is the first that hath arisen on this act, will probably govern all other cases which may arise on it. And it will be of mischievous consequence to give the sheriff a greater latitude than the legislature intended to give him. Some latitude it did intend to give, and therefore did not confine him to the *next* market-towns; because that would have rendered the execution of the act difficult, and subject to great niceties.

But the law did not intend to leave the matter wholly to the discretion of the sheriff; and therefore it requireth, that it be done in the market-towns *near* the place. This word is plainly restrictive of the sheriff's power; it is a guide to his discretion in the execution of the act: and what doth it mean? Not surely the most remote town; nor doth it mean a town *comparatively* remote, as, it is plain from the evidence, *Hadby* and *Ipswich* are.

On the whole, the court, without summing up a tittle of the evidence, directed the jury to find for the King on all the issues, except those which regard the proclamations in the market-towns near *Beauacre*; and on those to find for the prisoner; which they did. And then the court ordered, that the attorney-general take nothing by his prayer; and that the prisoner be remanded to *Newgate*, in order to answer for the original offence he standeth charged with in the information taken by Mr. *Burdus*, if the attorney-general shall think fit to indict him for it.

*N. B.* The Lord Chief-Justice was absent by reason of sickness; but he afterwards declared, that he entirely concurred with the other judges in the opinion they gave in this case.

The Case of *Æneas Macdonald*,  
*aliàs Angus Macdonald*.

IN the year 1747 a bill of indictment was found against him, under the special commission in *Surry*, for the share he had in the late rebellion. The indictment ran in the same form as those against the other prisoners, without any averment *that he was in custody before the first of January 1746*. But the counsel for the crown were aware of the exception taken in the case of Mr. *Townly* and others, and that since the whole proceeding against the prisoner was subsequent to *January 1746*, the answer then given would not serve the present case. That bill was therefore withdrawn before the prisoner pleaded to it; and a new bill, concluding with an averment *that he was apprehended and in custody before the first of January 1746*, was preferred and found against him. On that bill he was arraigned in *July 1747*, and his trial came on the 10th of *December* following.

Natural allegiance.

P. 12.

The overt acts charged in the indictment were sufficiently proved: and also that the prisoner was apprehended and in custody before the first of *January 1746*.

The counsel for the prisoner insisted, that he was born in the dominions of the *French King*, and on this point they put his defence.

But apprehending that the weight of the evidence might be against them, as indeed it was, with regard to the place of the prisoner's birth, they endeavoured to captivate the jury and by-standers, by representing the great hardship of a prosecution of this kind against a person, who, admitting him to be a native of *Great Britain*, had received his education from his early infancy in *France*; had spent his riper years in a profitable employment in that kingdom, where all his hopes centered: and speaking of the doctrine of natural allegiance, they represented it as a slavish principle, not likely to prevail in these times; especially as it seemed to derogate from the principles of the revolution.

Here

Dyer 298, 300.  
1 Hale 68, 96.

Here the court interposed, and declared, that the mentioning the case of the revolution as a case any way similar to that of the prisoner, supposing him to have been born in *Great Britain*, can serve no purpose but to bring an *odium* on that great and glorious transaction. It never was doubted, that a subject-born, taking a commission from a foreign prince and committing high treason, may be punished as a subject for that treason, notwithstanding his foreign commission. It was so ruled in doctor *Storey's* case: and that case was never yet denied to be law. It is not in the power of any private subject to shake off his allegiance, and to transfer it to a foreign prince. Nor is it in the power of any foreign prince, by naturalizing or employing a subject of *Great Britain*, to dissolve the bond of allegiance between that subject and the crown.

However, as the prisoner's counsel had mentioned his *French* commission as a circumstance tending in their opinion to prove his birth in *France*, the court permitted it to be read, the attorney-general consenting. It was dated the first of *June* 1745, and appointed the prisoner commissary of the troops of *France*, which were then intended to embark for *Scotland*.

The court, with the consent of the counsel for the crown, permitted the *cartel* between *France* and *Great Britain* for the exchange or ransom of prisoners likewise to be read; and observed, that, as it relateth barely to the exchange or ransom of prisoners of war, it can never extend to the case of the prisoner at the bar, supposing him to be a subject-born; because, by the laws of all nations, subjects taken in arms against their lawful prince are not considered as prisoners of war, but as rebels; and are liable to the punishments ordinarily inflicted on rebels.

Lord Chief-Justice *Lee*, in his direction to the jury, told them, That the overt acts laid in the indictment being fully proved, and not denied by the prisoner, or rather admitted by his defence, the only fact they had to try was, whether he was a native of *Great Britain*; if so, he must be found guilty. And as to that point, he said the presumption in all cases of this kind is against the prisoner; and the proof of his birth out of the King's dominions, where the prisoner putteth his defence on that issue, lieth upon him.  
But

But whether the evidence that had been given in the present case (which he summed up very minutely) did or did not amount to such proof, he left to their consideration.

The jury found him guilty, but recommended him to mercy. He received sentence of death as in cases of high treason; but was afterwards pardoned upon the conditions mentioned below.

*Macdonald at the Suit of Ramsay.*

While Mr. *Macdonald* lay under sentence of death, a creditor of his, ——— *Ramsay*, obtained leave from my Lord Chief-Justice at his chambers, to charge him in custody of the sheriff, in an action for a considerable sum of money; and accordingly he was so charged.

(1 Will. 217.)

A person attainted liable to civil suits.

In *Easter* term the 21st of the King, Mr. Attorney-general acquainted the court, that his Majesty had given orders for preparing a pardon for Mr. *Macdonald* to pass the great seal, upon condition of his retiring out of his Majesty's dominions, and continuing abroad during his life; and that one of the secretaries of state had sent his warrant to the keeper of the *New Prison* to deliver Mr. *Macdonald* into the custody of a messenger; but that the keeper refused to obey this warrant, alleging, that, as his prisoner stood charged in an action at the suit of Mr. *Ramsay*, he could not deliver him into the custody of a messenger, without incurring the danger of an escape. Mr. Attorney concluded with a motion, that the process Mr. *Macdonald* stood charged with at the plaintiff's suit might be discharged.

He was supported in this motion by Sir *John Strange* and the solicitor-general. It was said by Mr. Attorney, but not strongly insisted on, That a person under an attainder is *civili-ter mortuus*; his person and estate are absolutely at the disposal of the crown; and consequently he is not liable to civil suits: and to this purpose he cited *Trussell's case*.

1 Leon. 326.  
Cro. Eliz. 213.

To this point Mr. *Henley* and Mr. *Ford* for the plaintiff insisted, and so the court agreed, That the later resolutions have been, and the law hath been long settled, that an attainted person is liable to civil suits; but by the rules of the court he ought

ought not to be charged, without leave of the court, or of a judge at his chambers.

The point reported by *Leonard* and *Croke* to have been adjudged in *Trussell's* case came afterwards under consideration in actions brought by other persons against *that very man*, and was ruled quite otherwise \*.

The point chiefly insisted on by the counsel on the side of the motion was, That to charge the defendant in this case, so as to make his person liable, would be a means of defeating the King's pardon; because he would be thereby disabled to comply with the terms of it. It would be in effect saying, that his Majesty shall not grant a pardon on these conditions; he shall pardon absolutely, or not at all.

To this purpose they cited *Foxworthy's* case, reported in *Salk.* 500. 2. *Ld. Raym.* 848. *Far.* 153; and the case of *Coppin* and *Gunner*, in 2 *Ld. Raym.* 1572.

(*Stra.* 873.)

But the court said, We cannot judicially take notice of his Majesty's intentions touching the pardon. The crown, in case of pardons, signifieth it's pleasure *finally* and *irrevocably* by the great seal, and by that alone. A pardon may not pass at all; or it may be upon other conditions than are suggested at the bar, or it may be a free pardon: and therefore till the pardon is passed, it is too early for the court to give any opinion upon the main question. Accordingly the court gave no opinion, and Mr. Attorney took nothing by his motion †.

Mr. *Macdonald* having afterwards made his creditor Mr. *Ramfay* easy with regard to his debt, the action was withdrawn. And he was in *December* 1749 delivered into the custody of a messenger, by virtue of a warrant for that purpose from the Duke of *Newcastle*, one of his Majesty's principal secretaries of state.

*N. B.* The person of a man under an attainder is not absolutely at the disposal of the crown. It is so for the ends of publick justice, and for no other purpose. The King

\* *Os. Ent.* 246. a. b. *Cro. Eliz.* 516. *Co. Ent.* 248. 2 *And.* 38. *Moo.* 753. 3 *Inst.* 415.

† *N. B.* The rule in *Foxworthy's* case seems to have been overhasty, and the reasons on which it is grounded appear to me to be inconclusive: that in *Coppin* and *Gunner* seems more equitable; since it secured to the defendant the benefit of his pardon, without prejudice to the plaintiff, who might resort for satisfaction to the effects of the defendant, if he could find any.

may order execution to be done upon him according to law, notwithstanding he may be charged in custody at the suit of creditors. But till execution is done, his creditors have an interest in his person for securing their debts: and he himself, as long as he liveth, is under the protection of the law. To kill him without warrant of law is murder; for which the murderer is liable to a prosecution at the suit of the crown, and likewise to an appeal at the suit of the widow. For though his heir is barred by the attainder, which corrupteth his blood, and dissolveth all relations grounded on consanguinity, yet the relation grounded on the matrimonial contract continueth till death.

6 H. IV. 6. b.

7. a.

Cromp. Just.

113. a.

Bro. Appeal. 5.

(1 Inst. 33. b.)

And if a person under an attainder be beat or maimed, or a woman in the like circumstances ravished, they may, *after a pardon*, maintain an action or appeal, as their cases respectively may require. And though before a pardon they are disabled to sue in their own names, I make no doubt that they are intitled to prosecute, according to the nature of their respective cases, in the name of the King, who will do equal right to all his subjects.

3 Inst. 215.

*N. B.* During the trials of the rebels at *St. Margaret's-bill, Southwark*, under the commission of 1746, one of the prisoners challenged peremptorily, and for cause, so many of the jurors, that there was not a sufficient number left on the panel to proceed on his trial. In that case the court *ore tenus* (for it was, as hath been already observed, a commission of gaol-delivery as well as of oyer and terminer) ordered a new panel, and adjourned for several days. On the day of adjournment the sheriff returned a panel of the same jurors who had served through the whole proceeding, those who had been challenged by the prisoner, or sworn before, included; and a sufficient number appearing, he was tried.

Jurors challenged.

P. 1.

The like case happened on the trial of one of the assassins in King *William's* time. Mr. *Cook*; on the 9th of *May*, challenged in the like manner, till the jurors remaining on the panel were not sufficient to make a full jury. Whereupon the court *ore tenus* ordered a new panel, and adjourned to the 14th. On that day his counsel insisted, that a new panel ought not

4 Str. Tit. 708  
10731

F. 155.

not to have been ordered; but that an *habeas corpora*, with a *tales*, should have been awarded, according to the opinion in *Stanford*. But the court declared, that this being a proceeding under a commission of gaol-delivery, as well as oyer and terminer, they might, and indeed always do in the like case, award a new panel, if necessary, *ore tenus*, without writ or precept.

In a mere commission of oyer and terminer, no panel is ordered till the defendant hath pleaded to issue, and issue is actually joined; and then it is done by precept in the nature of a *venire*; and if in such case there should be a want of jurors, an *habeas corpora*, with a *tales*, may, said the court, possibly issue; but no *tales* can be granted upon a commission of gaol-delivery. And Mr. Justice *Powel* upon that occasion said, that if the sheriff had returned all new men, without regard to those who appeared and were sworn or challenged on the 9th, it had been well enough.

The reason of the adjournments in these cases was, that the prisoners might have copies of the new panels in due time, pursuant to the 7th of King *William*; otherwise new panels might have been ordered returnable *instante*.

P. 1.

The original panel in 1746 was upon great deliberation ordered, sitting the court, *ore tenus*, as under the commission of gaol-delivery; though, as I have already observed, a precept in common form for holding the sessions had issued under the seals of the three Chiefs and three Senior Judges.

### The Case of *William Nicholas*, at the *Bristol* Gaol-Delivery. *April 4, 1748.*

A murderer is not pardoned by an act of general pardon passed between the stroke and death, if murder be excepted.

HE was indicted for petty treason in the wilful murder of *Anne*, the wife of Dr. *William Logan*, to whom he was a hired servant.

It appeared on the trial, that on the 13th of *April* 1747 the prisoner knowingly and wilfully put a quantity of white arsenick into a pot of chocolate, which was provided for his master and mistress, who both drank of it. It very soon appeared, that they had taken poison; and proper means being used, the doctor in some time, with



With great difficulty, got the better of the disorder; but his lady, who was of a more weakly constitution, was never entirely free from the effects of the poison, which at length threw her into a lingering wasting disorder, of which, on the 31st of *January* following, she died.

Before the \* recorder directed the jury, † a gentleman of the bar desired to be heard as *amicus curiæ*. He submitted to the court, whether the prisoner is not intitled to the benefit of the act of general pardon passed in the last session: he admitted, that the offences of wilful murder, petty treason, and wilful poisoning, are excepted; but submitted, that the general pardon extendeth to all *misdemeanors* committed before the 15th of *June* 1747, and that the crime the prisoner stands charged with, *viz.* the administering the poison, was committed on the 13th of *April* before. This offence, till death ensued, could be considered in no other light than as a high misdemeanor: it could be considered in no other light at the time the act took place, and the pardon operated upon it in that light: and consequently the homicide, which was but the consequence of the offence pardoned by the statute, is likewise pardoned.

\* Mr. Justice  
Foster.

† Mr. Scudamore.

20 G. II. c. 32.

To this purpose, he cited and relied on 1 *Hale's Pl. Cor.* 426. "If a man give another a mortal stroke, and he die thereof within a year and a day; but *mesne* between the stroke and death, there comes a general pardon, whereby all "misdemeanors are pardoned, this doth pardon the felony consequently, because the act that is the offence is pardoned, "though it be not a felony till the party die."

To this it was answered by the recorder, that *Hale* in this passage groundeth himself singly on the authority of *Cole's* case in *Plowden*: *Crompton* lays down the rule much in the same manner, and cites the same authority for it; and some other authors have done the same. But the case, as reported by *Plowden*, doth by no means warrant the rule in the latitude now contended for. *Cole's* case is certainly good law, but the conclusion drawn from it by these authors is expressed in terms too general, and without a proper guard; because in the manner it is laid down by them, it seemeth to imply, that every

*Plowd.* 401.  
*Crompt. Just.*  
116. pl. 20.  
(See *Far.* 158.)

degree of homicide is within the pardon, which intervened betwixt the stroke and death; at least, it leaveth it in some measure doubtful, whether it is so or not.

13 Eliz. c. 28.

*Cole's* case was no more than this; he was indicted before the coroner for *manslaughter*, and the indictment charged, that he gave the mortal stroke on the 12th of *February* in the 13th year of the Queen, and that the party died of that stroke on the 18th of *June* following. Upon his arraignment he pleaded an act of general pardon, by which all felonies, offences, and misdemeanors (not therein excepted) committed before and until the 14th day of *February* in the 13th year of the Queen were pardoned; with an averment, that neither he, nor the offence laid in the indictment, are within the exceptions of the act.

Had the indictment been for murder, as in the present case it is, this averment had been evidently false; and consequently his plea could not have been allowed; for murder is expressly excepted, though manslaughter is not. The only doubt was, whether the general pardon did reach his case; because, till the death of the party, no felony could be said to have been committed by him; and the party dying after the day on which the act took place, it was doubted, whether the act could operate so as to pardon a felony which was not then completed.

The court took time to consider; and afterwards agreed, that the defendant was within the general pardon: "Because, saith the book, the stroke was the occasion of the felony; the giving of which stroke was the offence and misdemeanor against the Queen, which is pardoned by the act; and therefore every thing ensuing from that offence is likewise pardoned." These words, I own, are pretty general, and if they stood alone might beget some doubt: but I think they are sufficiently explained by the case, and amount to no more than this, That the felony having had it's commencement before the pardon took place, and being pardoned by the act (for manslaughter was pardoned) the prisoner was intitled to the benefit of the pardon, though the felony was not completed by the death of the party till after the act; that the pardon should operate in favour of the prisoner, in the same man-

ner

ner as it would have done, if the felony had been complete before the act, and in no other manner.

There is a like case in *Dyer*, where the point is left undetermined; but the book saith expressly, that the indictment was *de morte hominis, sed non ex malitia præcogitata, sive per murdram*. Dy. 99. pl. 65.

But how will these cases affect the prisoner at the bar? The court in *Cole's* case carried back the felony by relation to the time of the stroke, in order to intitle him to the benefit of the pardon; for the felony, *had it been completed before the act*, was pardoned by the act: but in this case, the prisoner cannot possibly avail himself of any such relation, since the crime he stands charged with is expressly excepted.

Besides, could he have pleaded the act in case it had been necessary for him to have pleaded it? He could not. For while the special pleading of a statute-pardon, in which there were exceptions of persons and crimes, was necessary, it was always incumbent on the party to aver, that neither he, *nor the offence laid in the indictment*, are within the exceptions of the act. This the prisoner at the bar could not have done; and consequently he could not have been intitled to the benefit of this act. And though the act now under consideration hath dispensed with this manner of pleading, and given the party the benefit of the pardon on evidence upon the general issue, yet still if it appear to the court, either that the party is excepted by name, or that the offence charged on him is excepted, the court cannot give him the benefit of the pardon.

Persons intended to be pardoned had been put to great difficulties in pleading specially: they had failed in point of form, or in point of time, or in some other circumstance necessary to render their plea available to them. To ease them of these difficulties, and *for that purpose only*, all the acts of general pardon since the restoration have taken away the necessity of special pleading. But the law, in other respects, standeth just as it did before; the facts, which formerly were to be specially pleaded, must now appear upon evidence to be true, otherwise the party cannot have the benefit of the act.

The jury found the prisoner guilty: and he had judgment of death, as in cases of petty treason, and was accordingly executed.

The true grounds of Stat. 1 Edw. VI. c. 12. f. 10, 13. concerning poisoning.

*N. B.* Some learned men seem to have been under a difficulty to account for the true grounds of the Stat. 1 E. VI. c. 12. which enacteth, That from *henceforth* wilful killing by poisoning shall be deemed wilful murder of malice prepensed; and that the offenders shall suffer as in other cases of wilful murder of malice prepensed.

11 Co. 32. a.

Lord Chief-Justice *Coke* is of opinion, that this provision in the statute was a needless caution; since wilful poisoning was undoubtedly murder of malice prepense, and *as such*, saith he, was ousted by the 23d and 25th of *H. VIII.*

Kel. 32.

Lord Chief-Justice *Kelyng*, upon the authority of Justice *Jones*, saith, that the statute of 1 E. VI. was but declaratory of the common law, and an *affirmation of it*.

Kel. 125.

Lord *Holt* accounteth for this act another way, and assigneth two reasons; First, killing by poison did not come under *Braeton's* definition, *manu hominum perpetrata*. But what doth *Braeton* mean by *manu hominum*; or, as he expresseth himself in a parallel place, *occisio ab homine facta*? His own words will best explain his meaning, "*Et est homicidium hominis occisio ab homine facta, si enim a bove, cane, vel aliâ re, non dicetur propriè homicidium.*" And in the chapter cited by his lordship, "*Item a manu hominum dicitur ad differentiam eorum qui a bestiis occiduntur,—vel qui mortui sunt per infortunium.*" He plainly meaneth homicide by the intervention of human means, nothing more.

Lib. 3. tract. 2. c. 4.

C. 15. f. 4.

His lordship's second reason is, That wilful poisoning did not come under the words of 13 R. II. f. 2. c. 1. The words of the act are, "Murdered or slain by await, assault, or malice prepensed." It might not in strictness of speech come under the words *await*, or *assault*; but certainly a man who is wilfully poisoned is murdered of malice prepensed.

I believe it never was doubted, whether wilful poisoning, the most deliberate, insidious, and hateful offence against the life of man, and at the same time the most easily perpetrated, was a capital offence at common law. All the antient authors  
speak

speak of it as a species of wilful, felonious homicide, *Braſton*, L. 3. tract. 2.  
 particularly in the places cited in part by Lord *Holt*, ſpeaketh C. 4. & c. 18. f. 5.  
 of it in that light; and *Fleta* ſaith, that in his time men were Lib. 1. c. 37.  
 drawn and hanged, and women burnt for it.

I take the true ground of the ſtatute of the 1 E. VI. to be  
 this: The 22 H. VIII. had made wilful poisoning high trea- 22 H. VIII. c. 9.  
 ſon, and had expreſſly excluded the offenders from clergy, and  
 directed that they ſhould be boiled to death. The 1 E. VI. C. 12. ſ. 2.  
 reduced all treaſons to the antient ſtandard of the 25 E. III.  
 This was a virtual repeal of the 22 H. VIII, and ſo, in the  
 judgment of the parliament, it became neceſſary to make ſome  
 new provision for the caſe of wilful poisoning, which un-  
 doubtedly deſerved a capital puniſhment; accordingly, by the  
 10th ſection of the act, the offenders are ouſted of clergy; and  
 the 13th enacteth, not in *affirmante* of the common law, as  
*Kelyng* ſuppoſeth, but by way of *revival* of it, that the offence  
 ſhall from thenceforth be deemed wilful murder of malice pre-  
 penſed, and that the offenders ſhall ſuffer and forfeit as in other  
 caſes of wilful murder of malice prepenſed.

The taking away clergy by expreſs words, which is done  
 by the 10th ſection, was in my opinion, though *Coke* thinketh  
 otherwiſe, abſolutely neceſſary; becauſe the ſtatutes, which 23 & 25 H. VIII.  
 ouſted clergy in the caſe of wilful murder, were made while  
 the offence of wilful poisoning did not fall under the denomina-  
 tion of murder, but of high treaſon, in which the crime of mur- Dyer 50.  
 der was merged; and conſequently, thoſe ſtatutes could not 6 Co. 13 b.  
 reach the offence of wilful poisoning: and though perhaps the  
 bare repeal of the ſtatute, which made the offence high treaſon,  
 might have reduced it to the rank it ſtood in at common law,  
 it was however thought moſt adviſable to do it by an expreſs  
 provision, which is done by the 13th ſection.

The parliament of the 7th of Queen *Anne* plainly proceeded 7 An. c. 21.  
 upon the ſame cautious principle, in a caſe exactly ſimilar to  
 this; I mean with regard to certain capital offences, which by  
 the law of *Scotland* were deemed high treaſon there.

The firſt ſection enacteth, that, after the firſt of *July* 1709,  
 no offences ſhall be high treaſon or miſpriſion of high treaſon

within *Scotland*, but those which are high treason or misprision of high treason in *England*; and the seventh section, reciting that the offences therein enumerated had been by several acts of parliament in *Scotland* declared to be high treason, but that after the said first of *July* the *aforesaid* acts of parliament will have no force or effect, enacteth, that those offences shall, after the said first day of *July*, be deemed capital offences; and that the offenders therein shall suffer and be tried in the same manner as by the laws of *Scotland* is provided in the case of other capital crimes.

### The Case of *William York*.

Infants liable  
to capital pu-  
nishments.

**A**T *Bury* Summer-ssizes 1748, *William York*, a boy of ten years of age, was convicted before Lord Chief-Justice *Willes* for the murder of a girl of about five years of age, and received sentence of death: but the Chief-Justice, out of regard to the tender years of the prisoner, respited execution, till he should have an opportunity of taking the opinion of the rest of the judges, whether it was proper to execute him or not, upon the special circumstances of the case; which he reported to the judges at *Serjeants-inn* in *Michaelmas* term following.

The boy and girl were parish children, put under the care of a parishioner, at whose house they were lodged and maintained; on the day the murder happened, the man of the house and his wife went out to their work early in the morning, and left the children in bed together; when they returned from work, the girl was missing; and the boy being asked what was become of her answered, that he had helped her up and put on her cloaths, and that she was gone he knew not whither. Upon this, strict search was made in the ditches and pools of water near the house, from an apprehension that the child might have fallen into the water. During this search, the man, under whose care the children were, observed, that a heap of dung near the house had been newly turned up; and upon removing the upper part of the heap, he found the body of the child  
about

about a foot's depth under the surface, cut and mangled in a most barbarous and horrid manner.

Upon this discovery, the boy, who was the only person capable of committing the fact that was left at home with the child, was charged with the fact, which he stiffly denied.

When the coroner's jury met, the boy was again charged, but persisted still to deny the fact. At length, being closely interrogated, he fell to crying, and said he would tell the whole truth. He then said, that the child had been used to foul herself in bed; that she did so that morning (which was not true, for the bed was searched and found to be clean); that thereupon he took her out of the bed, and carried her to the dung-heap; and with a large knife, which he found about the house, cut her in the manner the body appeared to be mangled, and buried her in the dung-heap; placing the dung and straw that was bloody under the body, and covering it up with what was clean; and having so done, he got water and washed himself as clean as he could.

The boy was the next morning carried before a neighbouring justice of the peace, before whom he repeated his confession, with all the circumstances he had related to the coroner and his jury. The justice of the peace very prudently deferred proceeding to a commitment, until the boy should have an opportunity of recollecting himself. Accordingly he warned him of the danger he was in if he should be thought guilty of the fact he stood charged with, and admonished him not to wrong himself: and then ordered him into a room, where none of the crowd that attended should have access to him.

When the boy had been some hours in this room, where victuals and drink were provided for him, he was brought a second time before the justice, and then he repeated his former confession: upon which he was committed to gaol.

On the trial evidence was given of the declarations before-mentioned to have been made before the coroner and his jury, and before the justice of the peace; and of many declarations to the same purpose which the boy made to other people after he came to gaol, and even down to the day of his trial; for

## THE REPORT.

he constantly told the same story in substance, commonly adding that the devil put him upon committing the fact. Upon this evidence, with some other circumstances tending to corroborate the confessions, he was convicted.

Upon this report of the Chief-Justice, the judges, having taken time to consider of it, unanimously agreed,

1st, That the declarations stated in the report were evidence proper to be left to the jury.

2dly, That supposing the boy to have been guilty of this fact, there are so many circumstances stated in the report, which are undoubtedly tokens of what my Lord Chief-Justice Hale somewhere calleth a *mischievous discretion*, that he is certainly a proper subject for capital punishment, and ought to suffer; for it would be of very dangerous consequence to have it thought, that children may commit such atrocious crimes with impunity.

(1 Hale 630.)

There are many crimes of the most heinous nature, such as in the present case the murder of young children, poisoning parents or masters, burning houses &c, which children are very capable of committing; and which they may in some circumstances be under strong temptations to commit; and therefore, though the taking away the life of a boy of ten years old may favour of cruelty, yet as the example of this boy's punishment may be a means of deterring other children from the like offences; and as the sparing this boy, *merely on account of his age*, will probably have a quite contrary tendency, in justice to the publick, the law ought to take it's course; unless there remaineth any doubt touching his guilt.

In this general principle all the judges concurred: but two or three of them, out of great tenderness and caution, advised the Chief-Justice to send another reprieve for the prisoner; suggesting that it might possibly appear on farther inquiry, that the boy had taken this matter upon himself at the instigation of some person or other, who hoped by this artifice to screen the real offender from justice.

Accordingly the Chief-Justice did grant one or two more reprieves; and desired the justice of the peace who took the boy's examination, and also some other persons in whose prudence



dence he could confide, to make the strictest inquiry they could into the affair, and report to him. At length he, receiving no farther light, determined to send no more reprieves, and to leave the prisoner to the justice of the law at the expiration of the last: but, before the expiration of that reprieve, execution was respited till farther order, by warrant from one of the Secretaries of State: and at the Summer assizes 1757, he had the benefit of his Majesty's pardon, upon condition of his entering immediately into the sea-service.

### The Case of *Abraham Evans*.

AT the sessions at the *Old Bailey* in *May* 1749 *John Avery* Larceny claim et secreta a personâ and *Abraham Evans* were indicted, *Avery* for privately stealing from the person of *Sir Giles Payne* one silk handkerchief, value 12d; and *Evans* for feloniously receiving the same, knowing it to be stolen.

*Avery* was found guilty to the value of 10d, and was ordered to be transported for seven years. *Evans* was likewise convicted of receiving the goods knowing them to be stolen; but judgment was respited as to him, upon a doubt whether sentence of transportation for fourteen years can be given against him upon the statute of 4 *Geo. I. c. 11*; in regard that the principal felon is found guilty of petty larceny only.

In *Michaelmas* vacation following the judges met at *Serjeants-inn* to consider of this doubt; and they agreed, *una voce*, that no judgment can be given against *Evans* on this verdict on the 4 *Geo. I.*

For though that act is express, *that persons convicted of buying or receiving stolen goods, knowing them to be stolen, shall be transported for fourteen years*, yet still it must mean persons legally convicted; persons convicted as accessaries after the fact under the statutes of 3 & 4 *W. & M. c. 9.* and 5 *Ann. c. 31.* But this man ought to have been acquitted, the principal felon being convicted of petty larceny only; and indeed the indictment against *Avery* being for petty larceny, *Evans* ought not to have been put upon his trial; for the acts, which make receivers of stolen goods knowingly accessaries to the

(1 Hale 616.) the felony, must be understood to make them accessaries in such cases only where by law an accessary may be; and there can be no accessary to petty larceny.

Accordingly, at the next sessions *Evans* was discharged.

Gaol-fever.

At the *Old-Bailey* sessions in *April* 1750, one *Mr. Clarke* was brought to his trial; and it being a case of great expectation, the court and all the passages to it were extremely crowded; the weather too was hotter than is usual at that time of the year.

Many people, who were in court at this time, were sensibly affected with a very noisome smell; and it appeared soon afterwards, upon an inquiry ordered by the court of aldermen, that the whole prison of *Newgate*, and all the passages leading thence into the court, were in a very filthy condition, and had long been so.

What made these circumstances to be at all attended to was, that within a week, or ten days at most, after the session, many people, who were present at *Mr. Clarke's* trial, were seized with a fever of the malignant kind; and few who were seized recovered.

The symptoms were much alike in all the patients; and in less than six weeks time the distemper entirely ceased.

It was remarked by some, and I mention it because the same \* remark hath formerly been made on a like occasion, that women were very little affected; I did not hear of more than one woman who took the fever in court, though doubtless many women were there.

It ought to be remembered, that, at the time this disaster happened, there was no sickness in the gaol more than is common in such places. This circumstance, which distinguisheth this from most of the cases of the like kind which we have heard of, suggesteth a very proper caution; *not to presume too far upon the health of the gaol, barely because the gaol-fever is not among the prisoners.* For without doubt, if the points

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\* *Camd. Elin. sub. an. 1577. Gilpin's life, p. 140.*

of cleanliness and free air have been greatly neglected, the putrid *effluvia* which the prisoners bring with them in their cloaths &c, especially where too many are brought into a crowded court together, may have fatal effects on people who are accustomed to breathe better air; though the poor wretches, who are in some measure habituated to the fumes of a prison, may not always be sensible of any great inconvenience from them.

The persons of chief note who were in court at this time and died of the fever were, Sir *Samuel Pennant* Lord Mayor for that year, Sir *Thomas Abney* one of the justices of the Common Pleas, *Charles Clarke* esquire one of the barons of the Exchequer, and Sir *Daniel Lambert* one of the aldermen of London. Of less note, a gentleman of the bar, two or three students, one of the under-sheriffs, an officer of Lord Chief-Justice *Lee*, who attended his Lordship in court at that time, several of the jury on the *Middlesex* side, and about forty other persons, whom business or curiosity had brought thither.

Mr. Justice *Abney*, of whom I can speak from a long and intimate acquaintance with him, was a very worthy man, learned in his profession, and of great integrity.

Character of  
Mr. Justice  
Abney.

His zeal for the interest of his country, which he well understood, begat in him a strong and early attachment to his Majesty and his royal house; which was, if I may be allowed the expression, his *ruling passion* to the day of his death.

He was, through an openness of temper, or the pride of virtue habitual to him, incapable of recommending himself by that kind of low assiduous craft, by which we have known some unworthy men make their way to the favour of the great.

However, his merit was not overlooked. He was first appointed attorney-general of the *Dutchy* and one of his Majesty's learned counsel; then steward of the Palace Court; afterwards a baron of the Exchequer; and last of all, one of the justices of the court of Common Pleas.

In his judicial capacity he constantly paid a religious regard to the merits of the question; in the light the case appeared

## THE REPORT.

appeared to him; and his judgment very seldom misled him.

In short, when he died, the world lost a very valuable man, his Majesty an excellent subject, and the publick a faithful able servant.

*Nec me meminisse pigebit.*

The Case of *Elizabeth Meadow.*

A woman on trial seized with pains of labour, and the jury discharged.

AT *Newgate* sessions in *January 1750*, present Lord Chief-Baron *Parker*, Mr. Justice *Foster*, and Mr. Justice *Birch*, *Elizabeth Meadow* was brought upon her trial for stealing out of a dwelling-house to the value of 40s and upwards.

While the prosecutor was giving his evidence, it was observed, that the prisoner was extremely discomposed, frequently fainting and screaming out as in great pain; and some of the jury doubting whether she had not the pains of labour on her, the court desired two matronlike women to go to the bar to her; and they desiring she might be removed into a private room, it was immediately ordered, and the women went with her. One of them soon afterwards returned, and being sworn declared, that according to the best of her judgment, and she had borne twelve children herself, the prisoner had the pains of labour upon her, though much before her time. The court thereupon ordered her back to *Newgate*, and that proper care should be taken of her there; and discharged the jury of her\*.

*John Nutbrown's Case.*

Burglary.

AT the same sessions *John Nutbrown* and *Miles Nutbrown* were indicted for burglary in the dwelling-house of one Mr. *Fakney* at *Hackney*, and stealing divers goods. It appeared by Mr. *Fakney's* evidence, that he held this house for a term of years which is not yet expired, and made use of it as a country-house in the summer, his chief residence being in *London*; that, about the latter end of the last summer, he re-

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(\* See *Stevenson's case* in *Leach* 443.)

moved

moved with his whole family to his house in the city, and brought away a considerable part of his goods; and that in *November* last his house was broke open and in part rifled: upon which he removed the remainder of his household-furniture, except a clock, and a few old bedsteads, and some lumber of very little value; leaving no bed or kitchen-furniture, nor any thing else for the accommodation of a family. Mr. *Fakney* being asked whether at the time he so disfurnished his house he had any intention of returning to reside there declared, that he had not come to any settled resolution whether to return or not; but was rather inclined totally to quit the house, and to let it for the remainder of his term.

The fact the prisoners were charged with was sufficiently proved; and was committed about midnight the first of *January* last.

The court was of opinion, that the prosecutor having left his house, and disfurnished it in the manner before-mentioned, without any settled resolution of returning, but rather inclining to the contrary, it could not, under these circumstances, be deemed *his* dwelling-house at the time the fact was committed; and accordingly directed the jury to acquit the prisoners of the burglary; which they did; but found them guilty of felony in stealing the clock and some other small matters; and they were ordered for transportation.

*N. B.* Where the owner quitteth the house, *animo revertendi*, it may still be considered as his mansion-house, though no person be left in it; many citizens, and some lawyers, do so from a principle of good husbandry in the Summer or for a long vacation. See *Pop.* 42, 52. 4 *Co.* 40. and in *MSS.* *Denton* and *Chapple*, a case upon a burglary in the house of Mr. *Nichols*, *Easter* sessions 10 *W.* III. But there must be an intention of returning, otherwise it will not be burglary.

### *John Howard's Case.*

AT the *Old Bailey*, *July* 3, 1751, present Lord Chief-Baron *Parker*, Mr. Justice *Foster*, and Mr. Justice *Birch*, *John Howard* was indicted on the statute for privately stealing goods

Larceny in a  
warehouse,  
10 & 11 *W.* III.  
c. 23.

## THE REPORT.

goods the property of Mess. *Fludyer* and Co. in the warehouse of *John Day*. There was another count in the indictment, charging that the prisoner stole the goods of *John Day* in his warehouse.

The case upon evidence appeared to be, that *John Day* kept a common warehouse by the water-side, where merchants did usually lodge goods intended for exportation, until they should have an opportunity of putting them on board. The goods in the indictment were sent by *Fludyer* and Co. to this warehouse, in order to be put on board a vessel bound for —, and were stolen by the prisoner in this warehouse.

(See Godfrey's case in Leach 235.)

The court was of opinion, that this is not a case within the statute; for by the word *warehouses* in the statute are meant, not mere repositories for goods, but such places where merchants and other traders keep their goods for sale in the nature of shops, and whither customers go to view them: and though the goods in this case might with propriety enough be laid to be the goods of *John Day*, as they are in the second count, since he had the charge and possession of them, which made him answerable to his principals for them; yet still the same objection recurrereth, his warehouse was not a place for sale, but merely safe custody.

Accordingly, the larceny being fully proved, the prisoner was by the direction of the court found guilty of larceny, to the value laid in the indictment, and acquitted of stealing privately in the warehouse.

(See Stone's case in Leach 274.)

*N. B.* It hath been generally holden, and I think very rightly, that the meaning of this act with regard to shoplifting is, that the goods &c. must be such as are usually exposed to sale in the shop, not any other valuable thing which may happen to be put there: and I think the same equitable construction should take place with regard to warehouses. The goods should be such as are usually exposed to sale in such places.

(See Seas' case, in Leach 248.)

And though coach-houses and stables, which are likewise named in the act, are not places for sale; yet still in the construction of so penal a law, I think it will not be amiss to carry the same equity as far as may be with regard to them.

them. The goods should be such as are usually lodged in those places.

But it hath been very rightly holden, that money is not within the act with regard to any of the places mentioned in it, the words being *goods, wares and merchandizes*: for although the word *goods* may in a large sense take in money, and often doth, yet being connected with *wares and merchandizes*, the safer construction of so penal a statute will be, to confine it to goods *ejusdem generis*, goods *exposed to sale* \*.

(See 1 P. Wms.  
267. 3 P. Wms.  
112.)

And if it shall appear on the evidence, as it often doth, that those places were broke open at the time of the larceny, the case will not, in my opinion, come within the act. For the words are, if any person shall *privately* steal, which seemeth to exclude all cases, where any degree of force is used to come at the goods.

### The Case of *Alexander Lord Pitligo*, in the House of Lords.

BY an act passed in the 19th of the King, reciting, that *Alexander Lord Pitligo*, and other persons therein named, had been in actual rebellion, and were fled from justice, it is enacted, that the said *Alexander Lord Pitligo &c. &c.* shall stand attainted of high treason, unless they surrender themselves to justice on or before the 12th day of July 1746.

19 Geo. II.  
c. 26.  
Mistomer in  
acts of attain-  
der, &c.

Lord *Pitligo* did not surrender in obedience to the act; and thereupon his lands in *Scotland* were surveyed and seized for the use of his Majesty by order of the court of Exchequer in *Scotland*, pursuant to the act of the 20th of the King, upon a presumption that he stood attainted by the act of the 19th. His Lordship, in due time, pursuant to the last-mentioned act, put in his claim to the lands in the court of Session,

20 Geo. II.  
c. 41.

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\* In like manner ruled upon the same principle, at *Maidstone, Lent* assizes 1752, in the case of *George Grimes*, indicted on the statute 24 Geo. II. c. 45. for stealing a considerable sum of money out of a ship in port; though great part of it consisted in *Portugal* money, not made current by proclamation but commonly current. (See the cases of *Mills*, *Leigh*, *Guy*, and *Morris*, in *Leach* 43, 50, 208, 368.)

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by the name of *Alexander Lord Forbes of Pitfligo*; setting forth that his ancestor was, by letters patent bearing date the 24th of *June* 1633, ennobled, and created a baron of *Scotland* by the name, stile and title of *Lord Forbes of Pitfligo*, which title is now descended on him; and insisted that he is not named in the act of attainder, and consequently doth not stand attainted, nor are his lands subject to forfeiture.

To this claim the King's advocate put in an answer, by which he admitted the patent of creation as stated in the claim; but insisted, that the claimant is the person meant and sufficiently described by the act. In proof whereof he alledged, that his Lordship and his ancestors have been most commonly named and described by the title of *Lord Pitfligo*; particularly in acts of Parliament, rolls, and minutes of Parliament, judicial proceedings and family settlements. All which was made out in proof, or admitted by his Lordship's counsel.

The cause coming on to be heard in the court of session, their Lordships pronounced their interlocutor, by which they find, that the said *Alexander Lord Forbes of Pitfligo* is not attainted by the act of the 19th of the King, and therefore sustain his claim, and decree possession to be delivered to him.

From this interlocutor his Majesty's advocate in behalf of his Majesty appealed; and the cause came to hearing in *January* 1750.

The Lords sat several days upon it. The facts stated in the case on either side were made out in proof, or admitted at the bar; and a great deal was said by the counsel on both sides on the doctrine of misnomer, improper addition, and the want of addition, in judicial proceedings; and how far defects of that kind may or may not be aided. But the true point was thought to lie in a much narrower compass, *viz.* Whether the respondent is the person named in the act of the 19th of the King; and whether he be sufficiently described by the name and title of *Alexander Lord Pitfligo*?

Mr. Hume and  
Mr. Forrester.

It was insisted on by his Lordship's counsel, that though the legislature in describing persons or things is not bound by the strict rules of law, by which all judicial proceedings are governed; yet in an act so penal as that which is the subject



subject of the present question, the persons who are the objects of it ought to be described by their proper names; so that one man may not suffer for the act or default of another.

It is admitted, that the ancestor of this Lord was ennobled by the name, stile and title of Lord *Forbes of Pittligo*, and that this title is descended on him. This title therefore is his proper legal name and no other: for titles of dignity have been always holden to be parcel of the name.

A mistake in the christian name in an act of the like kind hath been adjudged in the House to be fatal; though everybody knew who was intended by the act, and every part of the description exactly suited that person, and no-body else.

It was a case on the act of the first of the late King, which enacted, that if Major-general *Thomas Gordon* Laird of *Achintoule* and other persons therein named should not surrender by a certain day, they should stand attainted. The name of the Major-general, who indeed was Laird of *Achintoule*, and was intended by the act, was *Alexander*, and not *Thomas*: and the single point in judgment in the case was, Whether Major-general *Alexander Gordon* Laird of *Achintoule* was attainted by the act. (1 P. Wms. 612.)

The court of session in *Scotland* adjudged that he was not; and upon an appeal to this house by the commissioners for forfeited estates, the opinion of all the judges was taken upon this question\*.

Whether, if Major-general *Alexander Gordon* Laird of *Achintoule* had been brought to the King's Bench bar and execution prayed against him, the court would have awarded execution? And the judges having conferred together, the Lord Chief-Justice of the court of King's Bench delivered their opinion, that the said court could not award execution against *Alexander*; because in awarding execution they must pursue the act of Parliament on which the judgment is founded. And thereupon the decree of the court of session was affirmed.

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\* The question and answer of the judges are here copied from the journal. Mr. *Peer Williams*'s report of the judges' answer is not correct. He is mistaken too in saying that it was an appeal from a judgment of the commissioners for forfeited estates. It was an appeal from a decree of the court of session grounded on the act 5 Geo. I. c. 22. ff. 7, 8.

The like judgment was soon afterwards given by the House in the case of *Patrick Farquarson*, who was intended to be attainted by the same act, but was therein by mistake called *Alexander Farquarson*.

21 Ed. IV. fo.  
72. 2.

A mistake in an act of attainder with regard to a name of dignity, which is the present case, hath been likewise holden to be fatal. It was in the case of *Thomas Ormond*, who being no knight, was attainted by act of Parliament by the name of *Thomas Ormond knight*; and it was holden, that he lost nothing by the attainder, and that the act as to him was void: for, saith the book, it cannot be intended that he was the person attainted, since the word *knight* is part of the name; and *Thomas Ormond* could well say, that there is no such person as *Thomas Ormond knight*, in *rerum naturâ* \*.

Had the respondent been taken after the time limited for his surrender, he could not have pleaded any thing in bar of execution besides a misnomer, which he could have verified by his patent of creation; and in that case execution could not have been awarded against him; consequently he ought now to have the benefit of the same plea.

Or had he been pardoned by the name of *Lord Pittsfige*, and afterwards indicted by the name of *Lord Forbes of Pittsfige*, that pardon would not have availed him; and it would sound extremely harsh to say, that an act of attainder shall receive a more liberal construction than a charter of pardon; or that the same designation of the person shall in one case be sufficient to destroy him, which in another would not be sufficient to save him.

Mr. Attorney.  
Mr. Solicitor.

The counsel for the crown insisted, that the whole is reducible to two questions; Whether the respondent is the person *intended* to be attainted? And if so, Whether he is *described* with sufficient certainty?

Cotton's Records 670, 671.  
No. 20. and  
690. No. 27.

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\* It was observed by the solicitor-general, that there is no original report of this case extant: it is cited in the Year-book by one of the judges in his argument on another case; and there is room to doubt whether it did ever really come in judgment, or was not rather a case put by the judge by way of illustration; for *Thomas Ormond knight* was attainted by act of Parliament in the 1st of *Edw. IV.* and in the 12th of *Edw. IV.* the attainder was reversed by Parliament; so that probably the case never came in judgment elsewhere. However, as the other judges admitted the case to be good law, the book is an authority to the purpose for which it was cited by the counsel for the respondent.

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The legislature is not confined to any precise forms of expression; if their meaning appeareth with sufficient certainty, that, and that alone, is the true rule of construction in all cases whatsoever.

With regard to acts of attainder, and acts of the like kind with that which is the subject of the present debate; much greater latitude hath in all ages been taken in describing the persons intended, than is complained of in the present case; and yet those acts have had their full effect on the persons and estates of those who have been the objects of them: but if the present objection should prevail, those attainders, and all purchases made under them would be shaken at once.

In the act for the attainder of *Queen Katharine Howard* <sup>33 H. VIII. c. 21.</sup> and her accomplices, the *Lady Rochford*, who was the widow of the Viscount *Rochford*, who had been formerly attainted and had suffered for high treason, is frequently named, sometimes by the stile of the *Lady Jane Rochford*, at other times by the title of *Jane Lady Rochford*, and is attainted. Neither of these titles was in strictness due to her; and yet by both, different as they are, she is described in the act.

In the same act, the Lord *William Howard*, who was one of the sons of the Duke of *Norfolk*, and the *Lady Katharine Howard* his wife, are attainted of misprision of treason, by no other description than Lord *William's* courtesy title.

In the act of Oblivion, Sir *Hardress Waller*, Sir *Michael Livesy*, Sir *James Harrington*, Sir *Henry Mildmay*, Sir *Arthur Haslerig*, and Sir *Henry Vane*, among others, are excepted, without any sort of notice whether they were knights or baronets, or of what order of knighthood they were. <sup>12 Car. II. c. 11. f. 34, 39. 40, 42.</sup>

By an act of the same session, Sir *Michael Livesy*, by the same general uncertain designation, is, among others, attainted of high treason; and his estate and the estate of Sir *Hardress Waller*, by the same uncertain description of their persons, are vested in the King without office. <sup>C. 30.</sup>

By an act in the next session the real and personal estates of Sir *John Danvers*, Sir *John Bouchier*, Sir *Henry Mildmay*, Sir *James Harrington*, and Sir *Arthur Haslerig*, among others, <sup>13 Car. II. c. 15. f. 2.</sup>

by the same general uncertain designation of their persons, are vested in the crown without office.

S. 4. 5.

And by the same act Sir *Henry Mildmay* and Sir *James Harrington*, among others, by the same uncertain description, are degraded, and ordered to be drawn upon sledges through the streets of *London* to *Tyburn* with ropes about their necks, and afterwards to be imprisoned for life.

8 W. III. c. 5.

By an act passed soon after the assassination-plot, — *Johnson* alias *Harrison*, — *Durant* alias *Durance*, — *Byerly*, — *Plowden*, and — *Hungate* (blanks being left for their christian names) are among others required, as in the present case, to surrender by a day therein named, and in default thereof are attainted of high treason.

1 Geo. I. c. 41.

By an act in the time of the late King made upon the like occasion with the present act, Sir *David Trepland*, Sir *Hugh Paterfon*, Sir *Donald Macdonald*, Sir *John Preston*, and Sir *John Mackenzie*, without notice whether knights or baronets or of what order of knighthood, are among others required, as in the present case, to surrender by a day therein named, and in default thereof are attainted of high treason.

By these instances it appeareth to a demonstration, that the legislature never thought itself confined to the strict rules of law in describing persons whom it made the objects of punishment. It was sufficient, that the terms made use of were descriptive of the persons intended to be punished. It never was doubted whether the regicides, who are attainted or otherwise subjected to pains and penalties by the acts just now cited, were properly described; or whether their estates vested in the crown, though the very same objection might have been made in their cases as in the present, *that their full title of dignity was not set forth*. It is plain they were men of some dignity, knights or baronets; and it must be admitted, that all titles of dignity, the lowest as well as the highest, are parcel of the name, and that in all judicial proceedings the omission of even the lowest dignity would be fatal. The same may be said with regard to those who were attainted by the act of the first of the late King.

And

And with regard to those concerned in the assassination-plot, they are described merely by their surnames; and yet that description was thought sufficient to reach them.

These were all in strictness of law incomplete descriptions of the persons, yet they were never said to be insufficient in the case of a Parliamentary attainder. And what is there in the present case that distinguisheth it from those? Let it be admitted for argument's sake that Lord *Pitfligo* is imperfectly described, that his full title of creation is not set forth in the act; but let it be admitted too that he is described by his christian name, by his dignity (Lord) and by his Barony; by the title by which he is most commonly known, by which his ancestors were frequently named in acts of Parliament, in the rolls of Parliament, in their family settlements, and in judicial proceedings; and which he hath used in deeds executed by himself, and in his own letters, some of which have been read; let this be admitted, we have it all in proof, and then let any man find out the least distinction in favour of his Lordship between those cases and the present, if he can.

Three cases have been cited by the counsel on the other side, those of *Alexander Gordon*, *Patrick Farquarson* and *Thomas Ormond*, and one answer will go to all of them. They do not reach the present case. The present question is upon an *incomplete* description of the person, but a description not *repugnant to truth*; those descriptions were absolutely false; they could not with any shadow of truth be applied to the persons supposed to be intended. This distinction between incomplete and false descriptions is implied in the answer of the judges in *Gordon's* case; "In awarding execution we must pursue the act of parliament on which the judgment is founded;" in other words, we cannot go contrary to the act, we cannot award execution against *Alexander*, on a judgment against *Thomas*; for the law will not intend that *Alexander* and *Thomas* are the same person, and we must judicially take notice of legal intendments.

So in the case of *Thomas Ormond*, by intendment of law *Thomas Ormond* knight, and *Thomas Ormond* yeoman, are two different persons; for knight being a title of dignity is parcel

of the name : they are in legal estimation as different persons as men bearing two different christian names.

It hath been said, that Lord *Pitfigo*, were he to be taken, might plead his misnomer in bar of execution. That is absolutely denied. He could not plead a misnomer : he could plead no other plea than what all people in the like circumstances must plead, which is, \* *that he is not the person named in the act* : that is the only issue upon which he could put his case : on that issue, which is a mere matter of fact, he must stand or fall ; and upon that issue we submit the present case.

It hath likewise been said, that were he to be pardoned by the name of Lord *Pitfigo*, and afterwards indicted by the name of Lord *Forbes of Pitfigo*, such a pardon would not avail him. That likewise is denied. He would be intitled to the full benefit of the pardon pleading it with a proper averment, that *Alexander Lord Forbes of Pitfigo* named in the indictment, and *Alexander Lord Pitfigo* named in the pardon, is one and the same person ; for there would be nothing in this averment contrary to the intendment of law, as possibly in the case of different christian names there might.

The counsel having concluded, their Lordships put the following question to the judges, and adjourned to the next day.

The great-grandfather of the respondent being by letters patent under the great seal of *Scotland* in the year 1633 created a peer of *Scotland* by the title of Lord *Forbes of Pitfigo*, and the respondent and his ancestors claiming under the said letters patent having commonly used and subscribed themselves to deeds and other instruments, sometimes by the name or stile of *Forbes of Pitfigo*, and sometimes *Pitfigo*, and having been commonly described and known in legal proceedings and otherwise, as well by the name or stile of Lord *Pitfigo* as of Lord *Forbes of Pitfigo*, and the said respondent and his ancestors having been always entered in the rolls of the Parliament of *Scotland* (except in one private act of ratification

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\* See the record in the case of *Barkstead, Okey and Corba*, cited in Dr. Cameron's case, p. 111.

passed in 1681) by the name or stile of Lord *Pitfigo*; and it not being proved or alledged in this cause, that any other person besides the respondent was at or before the passing of the act of parliament herein after mentioned called or known by the name or title of Lord *Pitfigo*; and the respondent not having surrendered himself to justice on or before the day specified in the act of the nineteenth year of his Majesty's reign for attainting *Alexander* earl of *Kellie* and others therein named of high treason; whether the respondent is by virtue of the said act attainted of high treason by the name or title of *Alexander* Lord *Pitfigo*?

The judges upon conference among themselves agreed, that supposing the respondent to be the person intended and named in the act, he is sufficiently described by the title of Lord *Pitfigo*; since that description, though incomplete in point of strict form, is not repugnant to truth; which differeth this from the cases of *Gordon*, *Farquarson* and *Ormond*; and bringeth it within the rule upon which alone many of the acts of attainder cited by the counsel for the crown, especially those since the restoration, can be supported\*.

But lest, by giving a categorical answer to the question as stated, they might be thought to give an opinion *on a matter of fact as well as on the point of law* (which they will always avoid) it was agreed, that my Lord Chief-Justice in delivering the opinion of the judges should acquaint their lordships, that the judges do not presume to give any opinion whether the respondent is the person named in the act, that being a matter of fact of which their Lordships are now the proper judges, and in a proceeding in *Westminster-hall* it would be the province of a jury; but if their Lordships are satisfied, that the respondent is the person named in the act, the judges are of opinion that he is sufficiently described and well attainted by it.

Accordingly the next day my Lord Chief-Justice delivered the opinion of the judges to the effect above mentioned.

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\* In the proceedings against the Earl of *March*, upon which he was attainted in the 4th of *Edw. III.* he is stiled throughout the record, *Roger de Mortimer*. (See p. 390, 391).

Lord Chancellor spake largely, declaring his concurrence with the opinion of the judges in point of law; and the house unanimously reversed the interlocutor and dismissed the claim\*.

The Case of *John Drummond* Esqr. commonly called Lord *John Drummond*, in the House of Lords.

Forfeiture for  
high trea. on.

JAMES Lord *Drummond*, commonly called Duke of *Perth*, being seized in fee of the lands and earldom of *Perth*, by deed of settlement dated the 16th day of *June* 1743, granted, sold and disposed of his said estate to *Thomas Drummond* of *Logthormond* esqr. and his heirs, but redeemable in manner herein after mentioned, upon trust for the payment of all his the said *James's* debts, and subject to his debts and to some prior charges then subsisting, upon trust to pay to the said *James* during his life an annuity of two hundred pounds sterling; and after his decease upon the like trust for his brother the said *John Drummond* during his life: and upon farther trust to convey the premises, subject to his debts and the said annuities, to *John Drummond* uncle to the grantor in tail general, remainder to his sister *Mary Drummond* in tail general, remainder to the trustee himself in tail general, remainder to the right heirs of the grantor.

And upon farther trust to pay to such wife as the grantor should marry, during her life, an annuity of 10,000 marks *Scots*, for the separate use of such wife; and not to be subject to the grantor's *jus mariti*.

Then followeth the power of redemption to which the whole disposition is made subject, *viz.* that after payment of the debts of the grantor, the premises should be redeemable from the said trustee, and from the said *John Drummond* the uncle, and the said *Mary Drummond*, and the heirs of their

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\* The whole answer of the judges as it standeth on the Lords' Journal is: "That the respondent is fully and effectually attained by the act of the 19th of the King by the name or title of *Alexander Lord Pisfige*." But the Lord Chief-Justice did deliver the opinion with the caution and reserve touching the fact of the identity of the person, as above reported, though the Journal is silent as to that matter, the opinion delivered in writing not being sufficiently explicit in that respect.



bodies respectively, by the heirs of the body, male or female, of the said grantor, and, failing such heirs, by the heirs of the body, male or female, of the said *John Drummond* his brother, on payment of 200 *l.* sterling to the trustee, his heirs and assigns, at the market-cross of *Edinburgh*; or in their absence to the provost, or any of the bailiffs, dean of *Gild*, or treasurer of *Edinburgh*.

At the time this deed was executed *James Lord Drummond* the grantor had entered into the treasonable engagements with the pretender, of which some account is given by *Mr. Murray* in the trial of *Lord Lovat*; and his brother the said *John Drummond* was a captain in the *French* service; and both the brothers afterwards engaged in the rebellion of 1745.

*James Lord Drummond* the grantor, notwithstanding the disposition of the estate, continued in possession and received the rents and profits to the day of his death; and *Thomas Drummond* the trustee knew nothing of the deed at the time it was executed, never had the possession of it, nor so much as saw it.

By the act of the nineteenth of the King reciting, that the 19 G. II. c. 21.  
said *James Drummond* and *John Drummond* his brother and other persons therein named did on or before the 18th of April 1746 levy war against the King and were fled from justice, it is enacted, That if the said *James Drummond* and *John Drummond &c.* shall not render themselves to justice on or before the 12th of July 1746, they shall from and after the 18th of April 1746 stand and be adjudged attainted of high treason to all intents and purposes whatsoever; and shall suffer and forfeit as persons attainted of high treason by the laws of the land ought to suffer and forfeit.

*James Lord Drummond* died on the 11th of May 1746 in his passage to *France* after the action at *Culloden*; and the said *John* his brother and presumptive heir did not surrender pursuant to the act, and so became attainted; and the court of Exchequer in *Scotland*, pursuant to the act of the 20th of the 20 G. II. c. 42.  
King, caused the estate comprized in the settlement to be seized and surveyed for his Majesty's benefit, as being forfeited by that attainder,

*Thomas*

## THE REPORT.

*Thomas Drummond*, the trustee named in the settlement of the 16th of *June* 1743, put in his claim to this estate in due time in the court of session in *Scotland*, pursuant to the last-mentioned statute, and founded his claim on that settlement; alledging that the said *John Drummond* was never seized of, nor interested in the said estate, but that the claimant had right thereto by virtue of the said settlement.

To this claim his Majesty's advocate, on behalf of his Majesty, put in an answer, insisting on his Majesty's right grounded on the attainder and the forfeiture of *John Drummond*; and the cause coming to hearing before the court of session, that court found that the said *John Drummond* was upon the eleventh of *May* 1746, when the said *James* his elder brother died, capable to take by descent from his said elder brother; and that the estate in question did then descend to the said *John* his brother, and was forfeitable and forfeited by his treason and attainder; and that the said trust-disposition to the claimant is not sufficient to exclude the forfeiture of the said *John Drummond*; and thereupon dismissed the claim.

From this decree the trustee *Thomas Drummond* appealed; and the cause came to hearing in *April* 1751.

Two questions were made in this case; first, Whether by the laws of *Scotland* the settlement of the sixteenth of *June* 1743 was void, as having never been delivered to the grantee or any person on his behalf, but remaining always in the possession or power of the grantor?

Mr. Hume and  
Mr. Yorke.

This point was not greatly laboured by the counsel for the appellant; and as what was said upon it on either side was grounded on the laws of *Scotland*, by which the validity of all *Scotch* settlements must be determined, and which I do not understand, I will not take upon me to report the arguments on that point.

The second question was, supposing the settlement to be void, and that *James* Lord *Drummond* died seized in fee, Whether his brother the said *John Drummond* did take by descent any estate in the premises which was forfeitable by his attainder?

The

The counsel for the appellant argued, that he did not; that he was incapable of it; he had no heritable blood in him on the eleventh of *May* 1746, the day his brother died; for, not having surrendered pursuant to the act which attainteth him, he is now to be considered as a person attainted from the *eighteenth of April* preceeding.

If he had been actually attainted before the death of his brother, he could not have taken by descent; the land must have escheated. Lord Chief-Justice *Coke* is full to this point; 1 Inst. 13. a.  
 “The father is seized of land in fee holden of *J. S.*, the son is  
 “attainted of high treason, the father dieth, the land shall escheat  
 “to *J. S.* *propter defectum sanguinis*, for that the father died  
 “without heir: and the King cannot have the land, because  
 “the son never had any thing to forfeit.”

Lord Chief-Justice *Hale* putteth a stronger case on the same principle; 1 Hale 356.  
 “If there be a father and two sons,—and the elder  
 “son attaint survive the father but a day, and die without issue,  
 “the second son cannot inherit, but the land shall escheat *pro*  
 “*defectu hæredis*,” and if in the present case the land escheated,  
 the whole proceeding in the Court of Exchequer in *Scotland*,  
 of which the appellant complaineth, is void; it is *coram non*  
*judice*; for that court hath no jurisdiction touching escheats,  
 which by the law of *Scotland* are cognizable only in the court  
 of session.

It must be admitted, that the attainder of *John Drummond* was not complete till after the 12th of *July*; but being then completed, we say the statute expressly carrieth it back to the eighteenth of *April* preceeding, *to all intents and purposes whatsoever*.

And if he had been possessed of any other estate, and between the eighteenth of *April* and the twelfth of *July* had made a settlement of it upon the most favoured considerations, for payment of his debts, or in consideration of marriage; or had sold it for a valuable consideration actually paid, his attainder would have over-reached this settlement or sale. He would have been considered by virtue of this retrospective clause as a man disabled and under an attainder at the time the sale or settlement was made. And shall he now be considered as  
 a person.

a person under an attainder to one purpose alone, and not to all other purposes?

We are not now in the case of an attainder in the ordinary course of justice; in those cases, it is true, no corruption of blood is wrought till an actual attainder, though upon an attainder the forfeiture hath relation to the time of the treason committed; which relation is a mere fiction of law, introduced for the purpose of over-reaching mesne incumbrances: but we are in the case of a parliamentary adjudication; the legislature hath pronounced judgment of attainder upon *John Drummond* and others; and in pronouncing that judgment hath determined the time from which it shall operate *to every intent*.

Mr. Attorney  
and the Lord  
Advocate.

The counsel for the crown insisted, that on the eleventh of *May* 1746, when *James Lord Drummond* died, *John Drummond* was capable of taking the lands in question by descent, and remained so till after the 12th of *July*: that during all that interval, the estate vested in him, for it must vest somewhere on the death of *James*; and in the crown it could not vest by escheat, while there was an heir in being capable of inheriting: and consequently *John* being seized at the time of his attainder, the lands became forfeited, and are now vested in the crown by the express provision of the act of the 20th of the King.

This cannot be denied upon a supposition that *John Drummond* took by descent from his brother; and therefore it is said, that he was not capable of inheriting; that he must be considered, by virtue of the retrospective clause, as under an attainder from the 18th of *April* preceeding his brother's death.

This will receive a very short answer. Acts of parliament, like wills, are to be construed according to the plain obvious intent of the makers; the intent of the retrospective clause was to determine the time to which the forfeiture should relate, in order *to protect the title of the crown against all incumbrances subsequent to that time*; this was clearly the point, and the only point the legislature had in view: to imagine that the legislature intended to defeat the title of the crown upon the contingency which hath happened in the present case, (and it might have happened in the case  
of

of every man attainted by the act,) would be to suppose, that it intended to defeat and to protect the title of the crown upon different contingencies, by one and the same provision in the act: this is too absurd to be imagined; and therefore the construction contended for, grounded on the general words, *to all intents and purposes whatsoever*, cannot be supported by any rule of construction.

For it is a known rule in law, that general words in an act of parliament are not to be carried beyond the plain intent of the act; especially where the rights of the crown would suffer by such a latitude of construction.

The counsel having concluded, the House put the following question to the judges, and adjourned to the next day; Whether by the law of England *John Drummond*, second son of the late Lord *Drummond*, was on the 11th day of *May* 1746 capable of taking lands by descent; and whether by his not rendering himself to justice on or before the 12th day of *July* 1746, according to the act of the 19th year of his present Majesty, such descent became divested or avoided so as to prevent the forfeiture in prejudice of the crown?

The judges upon conference among themselves agreed, that the interest descended to *John Drummond*, and was forfeited by his attainder. They considered the act in the light of a parliamentary outlawry. The act chargeth, that the persons therein named did *on or before the 18th of April* 1746 levy war against the King, and were fled from justice; and then proceedeth to attain them, if they do not render themselves to justice on or before the twelfth of *July*.

This being an attainder out of the ordinary course of justice, it was proper on all accounts to fix the time to which it should relate, for avoiding all mesne incumbrances; the legislature hath done it, and in so doing, hath acted in exact conformity to the common law in the case of an outlawry for high treason in the ordinary course of justice: in which case the attainder relateth to the time of the treason *laid in the indictment*.  
Accordingly in the present case the attainder is, by the retrospective clause in question, carried back to the very day  
on

V. Bro. Relation, 43.

1 Hale 361.

on which the treason is by the preamble charged to have been committed.

This fully accounteth for the retrospective clause, and fixeth the sense of it. It was plainly inserted in exact conformity to the common law, and must therefore be accommodated to the rules of law in similar cases; for it is a safe rule of construction, that statutes, made in imitation of the common law, shall be expounded according to the rules of law in like cases.

Let it be supposed, that *John Drummond* had been outlawed upon an indictment for this treason, and that the indictment had charged the fact to have been committed, as this act doth, on the 18th of *April* 1746; his attainder for the purpose of avoiding all mesne incumbrances would have related to that day; and yet if, pending the process of outlawry, his brother had died seized of the estate in question, it would undoubtedly have been forfeited by *John's* attainder; for he would have been considered during the pendency of the process of outlawry, as a person capable of taking by descent. And consequently in the present case he must, in conformity to the rule of law in the case of an outlawry, be considered as a person capable of inheriting and holding on the eleventh of *May*, and thenceforward to the 13th of *July*; an interval exactly analogous to the pendency of process of outlawry, at common law.

The next day the Lord Chief-Baron, in the absence of the two Chief-Justices, delivered the opinion of the judges; That the said *John Drummond* was on the eleventh of *May* 1746 capable of taking lands by descent; and that by his not rendering himself to justice on or before the 12th of *July* 1746, according to the above-mentioned act of the 19th year of his present Majesty, such descent did not become divested or avoided so as to prevent the forfeiture in prejudice of the crown. And the Lords unanimously affirmed the decree.

The

## The Case of Captain *John Gordon*, in the House of Lords.

**S**IR *James Gordon*, by settlement dated 19th *October* 1713, entailed his barony and lands of *Park* in *Scotland* on himself for life, remainder to *William Gordon* his eldest son and the heirs male of his body; remainder to the heirs male of Sir *James's* own body, with several other subsequent limitations. (See Dalrymp. on Feudal Property, c. 4.) Estates tailzie in Scotland subject to forfeiture for high treason.

By this settlement *William Gordon* the son, and other heirs of *tailzie*, are, according to the forms used in *Scotland* in the case of strict settlements, prohibited to alter the course of succession by alienation or by any charge on the estate: or by any acts civil or criminal, even *treasonable acts*, whereby the same may become escheat or forfeited: and all acts to be done by any person in possession under the entail, contrary to this prohibition, are declared to be null and void as against the person next in succession; who, in case of such contravention, shall succeed to the estate in the same manner, as if such contravener were naturally dead.

Sir *James Gordon* died, and his son *William Gordon*, then Sir *William*, became duly seized under this settlement.

He took a part in the rebellion of 1745, and was attainted by the act of the nineteenth of the King; and his barony and lands of *Park* were surveyed and seized to the use of his Majesty under the act of the 20th of the King.

20 G. I. c. 47.

Captain *John Gordon*, who is Sir *William's* next brother, put in his claim in the court of session in due time, and in that claim stated the substance of the settlement of *October* 1713, with the prohibitory and irritant clauses before-mentioned, and insisted, first, that Sir *William* had long before his attainder incurred an *irritancy*, as they call it, of his estate, by creating an incumbrance on it in favour of one of his creditors; and that thereupon the estate devolved immediately upon him (the claimant) as next heir in tail, under the limitation

tation to the heirs of the body of Sir *James*, Sir *William* having then no issue.

Secondly, that in case there was no such irritancy incurred, yet Sir *William* by committing the crime of treason did contravene \* the prohibitive clause, and lost his title to the estate, which thereby immediately fell to the claimant.

And thirdly, that Sir *William* could at the worst forfeit by his attainder only an estate for his own life, and upon his death the premises in question must devolve upon the claimant, and the other heirs in tail.

To this claim his Majesty's advocate put in an answer; and, as to the irritancy supposed to be incurred by the incumbrance, insisted, that as Sir *William Gordon* might by the law of *Scotland* have been relieved against that irritancy, if the claimant had endeavoured in due time to take advantage of it, it shall not now be set up to over-reach the title of the crown by the attainder.

And as to the second and third points insisted on by the claimant, he relied on the statute of Queen *Anne*, whereby persons attainted of high treason in *Scotland* are made liable to the same forfeitures as persons attainted of high treason in *England*; and on the statute of *H. VIII.* whereby all estates of inheritance are made subject to forfeiture for high treason; and insisted that Sir *William Gordon* was, by virtue of the settlement of *October 1713*, seized of an estate of inheritance in the premises at the time of his attainder.

7 An. c. 21.

26 H. VIII. c.  
33.

The case coming on to be heard before the court of session their Lordships pronounced their decree to the effect following.

They find, that Sir *William Gordon* is by the entail disabled from alienating or incumbering the estate in question, or altering the course of succession in prejudice of the claimant and other heirs in tail; or from impairing their title to the same after his death: and that therefore the said estate is by Sir *William's* attainder forfeited to the Crown only during his

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\* See *Bendloe*, pl. 289. Gift in tail upon a condition something similar to this. The donee committed treason and was attainted. Adjudged, that the title of the Crown under the attainder was not affected by this condition.

It was a condition repugnant to the nature of feudal tenure, and against the wisdom and policy of the law.

life;



life; and that the claimant hath right to the same after the death of Sir *William*.

They also find, that the irritancy alledged to have been incurred by Sir *William* by the incumbrance in favour of his creditors, not having been in due time taken advantage of, the forfeiture by his attainder cannot now be over-reached on pretence of that irritancy; and decree accordingly.

From this decree both sides appealed. His Majesty's advocate from that part of it which declareth, that Sir *William Gordon* forfeited during his life only; and that the claimant and other heirs in tail will be intitled after his death.

Mr. *Gordon* from that part which declareth, that the forfeiture by the attainder cannot be over-reached on pretence of the irritancy. And the cause came to hearing in April 1751.

I say nothing of what was offered on either side upon Mr. *Gordon's* appeal, because the merits of it depend entirely on the laws of *Scotland*.

Two points were made upon the Lord Advocate's appeal.

First, Whether Sir *William Gordon* was, by the laws of *Scotland*, seized of any estate of inheritance in the premises in question at the time of his attainder?

Secondly, What estate or interest was forfeited by his attainder?

It was insisted on in behalf of the Crown, and not much controverted on the part of Mr. *Gordon*, that Sir *William* was seized of an estate in tail-male in possession; and that such estate, though not alienable or chargeable by him longer than for his own life, is by the law of *Scotland* deemed an estate of inheritance.

And on the other hand, it was admitted on the part of the Crown, that the limitation to the heirs-male of the body of Sir *James Gordon* on failure of issue-male of Sir *William* (who was his eldest son) is not by the law of *Scotland* an estate-tail executed in Sir *William*; but is a substitution, as they call it, in nature of a remainder created in favour of the younger sons of Sir *James*, and not affected by the attainder of Sir *William*.

Mr. Hume  
Campbell, and  
Mr. Lockhart.

See the acts of  
1685 and 1690.

The point principally laboured by Mr. Gordon's counsel was, That admitting Sir William to have been seized of an estate of inheritance, yet, since by the laws of Scotland he could not alien or incumber it for more than his own life, (which the counsel for the Crown admitted,) the consequence is, that he cannot forfeit any greater estate in the premises than during his life; and this, they said, is perfectly agreeable to the rules of our law in similar cases.

Before the statute *de donis*, the tenant, who was then considered as seized of a conditional fee, could, *post prolem suscitatum*, alien or incumber the fee at his pleasure; and in consequence of that, he could likewise forfeit the fee for treason or felony.

By having issue, the condition annexed to the fee was considered as performed to three purposes; to alien, to forfeit, and to incumber. But when the statute *de donis* took away the tenant's power of alienation, it was constantly holden, that he could not forfeit for treason or felony; though there is not a word in the statute which directly cometh up to the case of forfeitures. The words are "*Non habeant potestatem alienandi*:" but the judges, by an equitable construction of the statute, held, that the power of forfeiting was included in the word *alienandi*; for, saith my Lord Coke, *foris-facere* is *alienum facere*.

By the statute of treasons the forfeiture of traitors' estates is given to the Crown in very general words: but the rule was, That the act doth not extend to lands in tail; for tenant in tail shall forfeit no more than he may lawfully forfeit, that is, for his own life: and the general words of the act do not abrogate the statute *de donis*. The like rule is laid down upon the construction of the statute of provisors, where the words creating the forfeiture are very general; the rule is, Tenant in tail shall forfeit no more than he may lawfully forfeit, that is, for his own life.

The same rule prevailed with regard to estates-tail of the gift or provision of the Crown. When the 34th of H. VIII. had rendered them unalienable by the tenant in tail, the judges, upon the construction of that statute, constantly

ly field, that they were forfeitable only during the life of the tenant by his attainder for treason or felony. Halt 243.

From these instances, they argued, it appeareth, that the power of alienation and a capacity to forfeit constantly went hand in hand. It was thought unreasonable and against natural justice to carry one beyond the other: and therefore in the present case, admitting that Sir *William Gordon* was at the time of his attainder seized of an estate-tail in the premises, yet, since by the law of *Scotland* he had no power over the estate more than for his own life, he could not forfeit more than his life-interest in it.

The counsel for the Crown relied on the act of the 7th of Queen *Anne*, which hath incorporated the law of *England*, with regard to high treason and the forfeitures for it, into the law of *Scotland*, as effectually as if every *English* statute and rule of law touching those matters had been transcribed and enacted in it; and therefore, whatever statutes did subsist in *Scotland* before this act, by which estates-tail were protected against forfeitures for high treason, they are now totally repealed.

Mr. Attorney-general, and the Lord Advocate.

It is true, that from the making the statute *de donis* to the 26th *H. VIII.* estates-tail were not forfeitable for high treason, they are not forfeitable for felony to this day; but the law in this case was not founded on the principle laid down on the other side, that a capacity to forfeit and a power of alienation always went hand in hand, or were in the nature of convertible terms; it rested on a much stronger foundation, viz. upon the words of the act itself; "The land shall remain to the issue of them to whom it was given, after their death; or revert to the donor or his heirs, if issue fail."

So with regard to estates-tail of the gift or provision of the Crown, they, after the 34th of *H. VIII.*, were holden to be unforfeitable to the prejudice of the heir in tail; not upon the principle relied on, but from the express words of the act. "After the death of such tenant in tail the heir in tail may enter, have, and enjoy the lands according to the form of the first entail; the said recovery, or any other thing or things

## THE REPORT.

" *hereafter to be had, DONE, or suffered, by or against such*  
 " tenant in tail, to the contrary notwithstanding."

It was upon the foot of these exprefs provisions, *that the beir in tail shall after the death of the tenant hold and enjoy*, that these estates were protected from forfeitures: but the 26th of *H. VIII.* repealed the statute *de donis* as far as concerneth forfeitures for high treason, as the 5th and 6th of *Ed. VI.* did that of the 34th *H. VIII.*

And how was this repeal effected? Not by any exprefs declaration to that purpose, but by enacting, " That every offender being lawfully convict of any manner of high treason shall lose and forfeit to the King, his heirs and successors, all such lands which any such offender shall have *of any estate of inheritance* within the King's dominions at the time of such treason committed, or any time after; saving to all persons, other than offenders and their heirs, all such right as they might have had if this act had not been made." These are the words of the 26th of *H. VIII.*; and the 5th and 6th of *E. VI.* runneth in the same form, as far as concerneth the present question.

By these statutes all estates-tail were made liable to forfeiture for high treason, *as being estates of inheritance*. It was their descendable quality which brought them within the acts; that quality alone was regarded, not whether they were alienable by the tenant in possession.

For it is well known, that long before the 26th of *H. VIII.* tenant in tail in possession had an absolute power over the estate. He could bar his issue by fine, and all remainders were barable by a common recovery; and yet till that act operated upon his estate, it was under the protection of the statute *de donis*. On the other hand, estates-tail of the gift or provision of the Crown are unalienable to this day, and yet are subject to forfeiture for high treason.

And persons seized of the inheritance *en auter droit*, persons under a trust not to alien, and who had singly no power of alienation, were by the 26th of *H. VIII.* rendered capable of forfeiting the whole inheritance for high treason. This was the case of abbots, bishops, deans, prebendaries, and other sole corporations, who were seized of the inheritance  
*jure*

*jure ecclesiæ*; till the 5th and 6th of *Ed. VI.*, by confining the forfeiture to persons seized of the inheritance in *their own right*, restored and preserved the right of successors, as it was at common law.

1 Hale 252,  
253.

The point therefore is not, whether Sir *William Gordon* had a power of alienation over the estate in question, but had he or had he not any estate of inheritance in it at the time of his attainder? If he had, the inheritance, whatever it be, is forfeited. For as the 26th of *H. VIII.* took estates-tail out of the protection of the statute *de donis*; and the 5th and 6th of *Ed. VI.* took estates-tail of the gift or provision of the Crown out of the protection of the 34th and 35th of *H. VIII.*; so the 7th of Queen *Anne* hath taken this estate out of the protection of any acts made in *Scotland*, whereby forfeitures for high treason were saved.

Acts of 1685  
and 1690.

And that the legislature in framing that act had a view to estates-tail affected with irritant and prohibitive clauses, which is the present case, and considered them as inheritances thereby made forfeitable for high treason, is plain from the provisoe in the fourth section; which provideth, that, in certain cases therein mentioned, such estates shall not be forfeited upon the attainder of the tenant in tail, but during the life of such tenant only; "So that the issue and heirs in tail shall inherit the same, the said attainder notwithstanding."

Nothing can be clearer than that the estates saved from forfeiture by this provisoe are considered by the law of *Scotland* as estates of inheritance. And the caution taken to save estates of this kind, under the special circumstances mentioned in the provisoe, plainly sheweth, that, without this caution, they would have been involved in the general purview of the act.

The counsel having concluded, the Lords put the following question to the Judges, and adjourned to the next day.

Supposing that by the law of *Scotland* an estate tailzie, with prohibitive, irritant, and resolute clauses, is an estate of inheritance; and supposing also that by the law of *Scotland* no estate or interest was vested in Sir *William Gordon* by virtue of the limitation in the settlement of the 19th of *October*

1713, to the heirs-male of the body of Sir *James Gordon*, what estate or interest in the barony and lands in question was forfeited to the Crown, under the limitations of the said settlement, by the attainder of Sir *William Gordon*?

On the next day the Lord Chief-Baron, in the absence of the two Chief-Justices, delivered the opinion of the judges, as followeth.

Upon this question we are of opinion, That the estate and interest in the barony and lands in question, which was forfeited to the Crown under the limitations of the said settlement by the attainder of Sir *William Gordon*, was not only during the life of Sir *William Gordon*, but so long as there shall be any heir-male of his body; and also the reversionary interest in the fee thereof, limited by the said settlement to the heirs and assigns whatsoever of the said Sir *James Gordon*, on failure of the heirs-male of the body of the said Sir *James Gordon*, and the determination of the several estates by the said other substitutions; supposing that by the law of *Scotland* such reversionary interest was in Sir *William Gordon* at the time of his attainder\*.

Whereupon their Lordships ordered and adjudged, That the first part of the said interlocutor, whereby the Lords of Session found, "That Sir *William Gordon*, the person attainted, being "by the entail disabled from alienating the estate, charging "the same with debts, or altering the course of succession in "prejudice of the claimant and other heirs of tailzie, or from "otherwise hurting or impairing their right or title to the said

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\* In this case there being an express limitation to Sir *William Gordon* the eldest son and the heirs-male of his body, previous to the remainder limited to the heirs-male of Sir *James* the father, the Lords considered this remainder to the heirs-male of the body of the father in the same light as it is considered by the law of *Scotland*; namely, as a substitution in favour only of the younger sons of Sir *James*; and under which Sir *William* the eldest took no estate upon the death of his father; and consequently that by the attainder of Sir *William* the estate limited to the heirs-male of Sir *James* was not forfeited.

But had the limitation been to Sir *James* and the heirs-male of his body, without any previous limitation in favour of Sir *William*, and Sir *William* had on the death of his father become intitled under that limitation as heir of his body, in that case the whole entail would have been forfeited by his attainder, that is, as long as there should be heirs of the body of Sir *James*.

It was so adjudged in the House of Lords in May 1753, in a case whereip *Charles Mercer* second son of Sir *Lawrence Mercer* was appellant, and his Majesty's advocate for *Scotland*, in behalf of his Majesty, respondent.

"estate

“ estate after his death in any manner of way whatsoever, and  
 “ that therefore the estate and barony of *Park* is by Sir  
 “ *William*’s attainder forfeited to the Crown only during his  
 “ life; and that the said *John Gordon* the claimant hath right  
 “ to the said estate and barony of *Park* after the death of the  
 “ said Sir *William Gordon*,” be and the same is hereby re-  
 verfed.

And it is farther ordered and adjudged, That the latter part  
 of the said interlocutor, whereby the Lords of session found,  
 “ That the irritancy alledged to be incurred by Sir *William*  
 “ *Gordon* the attainted person not having been declared nor  
 “ any advantage taken of it before the forfeiture, the forfeiture  
 “ cannot be over-reached or excluded on pretence of that irri-  
 “ tancy,” be and the same is hereby affirmed.

And it is also hereby declared and adjudged, That Sir *William*  
*Gordon*, the person attainted, being, under the settlement made  
 by his father Sir *James Gordon*, dated the 19th of *October*  
 1713, seized of an estate-tailzie in the barony and estate of  
*Park*, notwithstanding such tailzie was affected with prohibi-  
 tive, irritant, and resolute clauses, the said barony and estate  
 of *Park* did, by virtue of the statute of the 7th year of the  
 reign of Queen *Anne*, chap. 21. become forfeited to the Crown  
 by the said Sir *William Gordon*’s attainder, during his life, and  
 the continuance of such issue-male of his body as would have  
 been inheritable to the said estate-tailzie in case he had not  
 been attainted; and also for such estate and interest as was vest-  
 ed in, or might have been claimed by the said Sir *William Gor-*  
*don* by virtue of the last limitation in the said settlement to the  
 heirs and assigns whatsoever of the said Sir *James Gordon*,  
 after all the substitutions therein contained shall be expired or  
 determined: and that by virtue of the substitution to the heirs-  
 male of the said Sir *James Gordon*’s body of his then present  
 marriage, the respondent *John Gordon* hath right to succeed to  
 the said barony and estate of *Park* after the death of the said  
 Sir *William Gordon* and failure of such issue-male of his body as  
 aforesaid, according to the limitations of the said settlement,

And it is farther ordered, That liberty be reserved to the  
 Crown, and also to the said *John Gordon*, and any other per-  
 son

son who may become intitled to the said barony and estate of *Park* by virtue of any of the said substitutions, to apply to the said court of session for such farther order or direction in the premises as shall be just, as often as any new right shall accrue to them respectively in consequence of any of the substitutions or limitations in the said settlement.

*Note.* The court of session, in all cases of the like kind which came before them after the rebellion of 1715, held according to an opinion then generally entertained among the *Scotch* lawyers, that estates-tail affected with irritant, prohibitive, and resolute clauses were liable to forfeiture only during the life of the person forfeiting; and the crown did not appeal from any of those judgments: though it is extremely clear that, supposing those estates to be by the law of *Scotland* estates of inheritance, they are made liable to forfeiture for high treason by the statute of *Queen Anne*, in the same manner as estates of inheritance in *England* are made liable to forfeiture by the statutes of *H. VIII.* and *Edw. VI.* cited in the argument of this case. And that they are by the law of *Scotland* estates of inheritance was not denied by *Mr. Gordon's* counsel. See *Craig de Jure feudal, lib. 2. c. 16. De Successione Taliata, f. 2, 3.*

### The Case of *John Swan* and *Elizabeth Jefferys*.

(10 St. Tri. 36.)

*Auterfois arraigned no good plea.*

AT *Chelmsford* assizes in the Summer 1751, *John Swan* and *Elizabeth Jefferys* were indicted for the murder of ——— *Jefferys*; *Swan* for giving the mortal wound, and *Jefferys* for being present aiding and abetting, and they both pleaded not guilty: but their trial was postponed to the next assizes.

In the mean time the attorney-general, who had received orders to prosecute at the expence of the Crown, was satisfied from the evidence laid before him, that *Swan* was in the actual service of the deceased at the time the murder was committed,



mitted, or at least when the design was first laid. He therefore thought it advisable to prefer another bill against them for the parts they respectively took in the same murder, charging *Swan* with petty treason, and *Jefferys* with murder. Accordingly, at the next assizes such bill was preferred and found, and the prisoners were arraigned upon it.

The prisoners pleaded in abatement *ore tenus*, that another indictment was depending for the same offence; and pleaded over to the treason and felony. The counsel for the Crown did not insist upon drawing up the plea in form (as was done in *Layser's* case), but demurred *ore tenus*; and the counsel for the prisoners joined in demurrer.

Mr. Justice *Wright*, who sat on the crown-side, desiring the company of Mr. Justice *Foster*, who went that circuit with him, at the arguing of the plea, he went into court and sat there till that matter was determined and the jury sworn.

The prisoners' counsel insisted, that they ought not to have been arraigned on this new bill, pending the former indictment, on which issue is already joined; because if they plead to issue on this indictment they may be liable to be tried twice for one and the same fact: it will be in the option of the Crown after issue is joined upon both indictments, to proceed to trial upon either of them; and if the prisoners should be acquitted upon one, they may still be tried upon the other. For though *autrefois acquit* of murder may be a good bar to an indictment of petty treason for the same fact, or *autrefois acquit* of petty treason to an indictment of murder; yet the prisoners having pleaded to issue on both indictments, they may be told, that they come too late with their plea in bar, issue being already joined on the fact.

They therefore pressed, that the trial on the first indictment might go on before the prisoners should be called upon to plead to the second; for, said they, if the prisoners should be found guilty on that indictment the ends of publick justice will be fully answered: and if they should be acquitted, and the counsel for the Crown should think proper to proceed on this

new

new bill, the prisoners ought to be left at liberty to avail themselves of that acquittal as they shall be advised.

The court was of opinion, that the charge in the bill last found must be answered, notwithstanding the pendency of the former, for *auterfoits arraign* is no plea in this case. Perhaps the bill last found is better adapted to the nature of the case than the former, and the King's counsel must be at liberty to prosecute in such manner as may best answer the ends of publick justice. But at the same time the court must take care, that the prisoners be not exposed to the inconvenience of undergoing two trials for one and the same fact.

Petit treason  
and murder  
the same offence.  
(See Disc. II.  
c. 9.)

With regard to the prisoner *Jefferys*, the offence charged in both indictments is exactly the same, as well in consideration of law as in point of fact; with regard to *Swan*, the fact in both is the same; and so is the substantial part of the charge, *wilful murder of malice prepense*; but falling under a different consideration in the second indictment, merely from the relation the prisoner is supposed to stand in to the deceased: and if that relation should not be made out in proof, yet still he may be found guilty of murder upon that indictment.

And therefore, as the ends of publick justice would be fully answered with regard to both the prisoners, by trying them on the indictment of petty treason and murder, the court proposed to the King's counsel, that the first indictment should be quashed by consent, to which they agreed; which was accordingly done, and the court proceeded to the trial of the prisoners on the second indictment on the issue of not guilty.

(See 3 Bur.  
1468.)

The court in this case followed the precedent in *Gro. Car.* 147, Sir *William Withypale's* case; only they took in the consent of the King's counsel, which, I think, they needed not to have asked; the justice of the case being a sufficient warrant for what they did.

Before the jury was called, the judges agreed between themselves, that if the prisoners should not think fit to challenge at all, they might be tried together: but if they should insist on their challenges, they must be tried separately; because they cannot join in their challenges, the number of their  
peremptory

peremptory challenges being differently limited, *Swan's* to 35, and *Jefferys's* to 20.

The court informed them of this, and the prisoner *Swan* declaring that for his part he waved all benefit of challenging, the prisoner *Jefferys* challenged two or three, and a jury was sworn. The prisoners were found guilty, *Swan* of petty treason, and *Jefferys* of murder; and were both soon afterwards executed upon a gibbet erected near the place where the fact was committed; and *Swan* was hanged in chains.

At a meeting of the judges at the Lord Chief-Justice *Lee's* chambers in *June* 1752, to consider of the act of the last session, for the better preventing the horrid crime of murder, it was agreed by much the greater part of the judges, that the judgment for dissection and anatomizing and touching the time of execution ought to be pronounced in cases of petty treason, though murder is only mentioned, except in the case of women\*: and in that case too, the time of execution may be a part of the judgment.

25 G. II. 37.  
Judgment in  
murder.

There was some doubt, whether hanging in chains might ever be made part of the judgment; but on debate it was agreed by nine judges, that, in all cases within the act, the judgment for dissection and anatomizing only should be part of the sentence: and if it should be thought advisable, the judge might afterwards direct the hanging in chains by special order to the sheriff, pursuant to the power given for that purpose in the proviso.

### The Case of *George Gibbons*,

AT the *Old Bailey* in *June* 1752, present Lord Chief-  
Baron, Mr. Justice *Foster*, and Mr. Justice *Birch*;  
*George Gibbons* was indicted for burglary in the dwelling-

Burglary.

\* Though the 1 E. VI. c. 12. enacteth, that wilful poisoning shall be deemed murder of malice prepensed, and that the offender shall suffer and forfeit as in other cases of wilful murder; yet if the wife or servant poison husband or master they are constantly indicted for petty treason and suffer the pains peculiar to that offence. Petty treason is considered in no other light than as an aggravated murder. (See Disc. II. c. 9.)

house

house of *John Allen*. It appeared in evidence, that the prisoner in the night-time cut a hole in the window-shutters of the prosecutor's shop, which was part of his dwelling-house, and putting his hand through the hole took out watches and other things which hung in the shop within his reach: but no entry was proved otherwise than by putting his hand through the hole. This was holden to be burglary and the prisoner was convicted.

3 Inst. 64.  
(1 And. 114.  
Leach 313.)

1 Ed. VI. c. 12.  
sec. 10.  
39 Eliz. c. 15.

*N. B.* This hath been always so holden. The law requireth an entry, to complete the crime of burglary; but if any part of the body be within the house, hand or foot, this at common law is sufficient. And I conceive that such a kind of entry will be sufficient to bring the case within the statutes of *Ed. VI.* and *Eliz.* with regard to house-breaking attended with larceny in the day-time.

I am likewise of opinion, that, with regard to the single point of breaking the house, whatever kind of breaking will make a man guilty of burglary at common law, will bring him within those statutes; and that no act of violence short of a common-law burglary will.

*MS. Denton.*

1 Hale 527.

1 Hale 508, 524.

At a meeting of the judges upon a special verdict in *January 1690*, they were divided upon the question, whether breaking open the door of a cupboard let into the wall of the house was burglary or not. *Hale* saith, that such breaking is not burglary at common law; but thinketh it would be sufficient to bring the case within the statutes I have just cited. This distinction he groundeth on *Simpson's* case, and even saith that in that case the breaking open a chest in the house brought the case within the 39th of *Eliz.*, which, I speak it with great deference, if a moveable chest be meant, cannot be law.

2 Hale 358.  
Kel. 31.

*Simpson's* case, as truly stated by *Hale* in one part of his work and by *Kelyng*, doth not in my opinion warrant any such distinction. It did not, nor possibly could, turn on the circumstance of breaking a chest or fixed cupboard or any thing like it: nor doth it appear from the state of the case, that there was the least occasion to resort to any such constructive breaking; for in fact both outer and inner doors were broke open.

The case, in my opinion, turned singly on this point. The man had broke open the chest, and *brought the goods into the hall* in order to carry them off, but was apprehended in the house. It was made a question whether this amounted to a stealing in the house within the 30th of *Eliz.* and it was holden that it did: the man had once possessed himself of the goods *animus furandi*. This at common law amounted to a caption and asportation, otherwise few persons who are taken in the fact could be convicted of larceny; and this being so, the construction of the statute must be accommodated to the rules of common law in like cases.

(He only laid them on the floor. See *Kel.* 31. 1 *Hale* 358.)

*Hale's Sum.* 64.  
69.  
*Lib. Ass.* 39.

With regard to cupboards, presses, lockers and other fixtures of the like kind, I think we must, in favour of life, distinguish between cases relative to mere property, and such wherein life is concerned. In questions between the heir or devisee and the executor, those fixtures may with propriety enough be considered as annexed to, and parts of the freehold. The law will presume, that it was the intention of the owner, under whose bounty the executor claimeth, that they should be so considered; to the end that the house might remain to those, who, by operation of law or by his bequest, should become intitled to it, in the same plight he put it or should leave it, entire and undefaced. But in capital cases, I am of opinion, that such fixtures, which merely supply the place of chests and other ordinary utensils of household, should be considered in no other light than as mere moveables, partaking of the nature of those utensils and adapted to the same use.

(2 *Vern.* 508.  
1 *P. Wms.* 94.)

### Doctor Cameron's Case.

**P**LEAS before our Lord the King at *Westminster* of *Easter* term in the 26th year of the reign &c.

(10 *St. Tri.* 202.)  
A person attainted of treason by act of parliament.

Amongst the pleas of the King Roll.

**ENGLAND.** Our present Sovereign Lord the King hath transmitted to his beloved and faithful Sir William Lee and others his fellows, justices, &c. [as in the case of Mr. Murray of Broughton, *mutatis mutandis*.]

P. 47.

Doctor

Doctor *Archibald Cameron*, who was one of the persons attainted by the act of the 19th of the King, was, on the seventeenth of *May* 1753, brought to the bar, by *habeas corpus* directed to the lieutenant of the Tower; and being arraigned by the secondary on the Crown-side, the writ of *mittimus* with the *certiorari* and return were read to him by the secondary. The attorney-general then prayed, that execution might be awarded; and the secondary demanded of the prisoner, what he had to say why execution should not be done upon him.

The prisoner, who, during the whole time he stood at the bar, behaved with great propriety, not insensible of his condition nor greatly disconcerted, said, That he was led to take a part in the rebellion, against his own judgment and inclination, by some upon whom his all depended; that he still flattered himself he should appear not unworthy of his Majesty's mercy; and he mentioned some facts which he hoped might intitle him to it. He said he did not offer these things as a defence he relied on in point of law, but as facts which he hoped might have some weight in another place, for he was determined to throw himself intirely on his Majesty's mercy.

Whereupon, proclamation being made for silence, the Chief-Justice, after a short exhortation to the prisoner, pronounced the usual judgment in case of high treason, *as an award of execution grounded on the act of attainder*. And a rule was made for his execution on the seventh of *June*, and writs for that purpose to the lieutenant of the Tower and the sheriff of *Middlesex* were ordered, as in the case of Mr. *Ratcliffe*.

And he was executed accordingly.

1 H.VII.23,25.  
1 Sid. 72.  
1 Lev. 61.  
3 St. Tri. 855,  
875.

The court in pronouncing judgment in this case followed the precedents in the cases of *Humphry Stafford*, and of *Barkstead, Okey* and *Corbet*. The cases of *Holloway* and Sir *Thomas Armstrong* in *Charles* the second's time, and of Lord *Griffin* in the late Queen's time, were mentioned at a conference among the judges of the King's Bench on this occasion; but little regard was paid to them.

For in *Holloway's*, which was the leading case, the opinion of the Court seemeth to have been given hastily and against

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the

the sense of the bar. And in Lord Griffin's case Chief-Justice Holt, who was at that time absent, was of a contrary opinion, and, as I have heard, constantly persisted in it; and I do not see how an attainder by outlawry at common law is, in this respect, distinguishable from the case of an attainder by act of parliament, which, in the present case, is but in nature of a parliamentary outlawry.

Indeed, in cases within the act of the 19th of the King, c. 34, where the proceeding is upon a suggestion on the roll that the prisoner did not surrender to justice pursuant to that act, the constant course hath been to award execution without pronouncing sentence of death as in cases of felony: but that practice is grounded on the words of the act; "And it shall be lawful for the Court to award execution against such offender in such manner as if he had been convicted and AT-TAINTED in the said court."

The record in the case of *Barkstead &c.* was searched, and the judges had copies of it. It is of *Easter* term in the fourteenth of King Charles the second; it agreeth *mutatis mutandis* with the record in Mr. Murray's case; and after setting forth the act of parliament by which the prisoners stood attainted it proceedeth, *Et modo scilicet die Mercurii prox' post quinden' Pasch' isto eodem termino coram domino rege apud West' veniunt prædicti Johannes Barkstead, Johannes Okey, & Milo Corbet, per Johannem Robinson mil. & bar. locum-tenent' Turris London', virtute brevis domini regis de habeas corpus ei inde directi ad barram hic ducti in propriis personis suis (in cujus custodia præantea ex causis prædicti commissi fuerunt) qui committuntur eidem locum-tenent': super quo quæsit' est per cur' de eisdem Johanne Barkstead, Johanne Okey, & Milone Corbet, si quid pro se babeant, vel dicere sciant, quare cur' hic ad executionem de eis & eorum quolibet procedi non debeat; qui separatim dicunt quod ipsi non sunt eadem personæ, nec eorum aliquis est eadem persona, quæ de altâ prodicione prædicti in actu parlamenti prædicti specificat' convicti & attincti existunt; & hoc parat' sunt verificare prout cur' &c. unde petunt judicium &c; & Galsfridus Palmer mil. & bar. attornat' domini regis generalis qui pro eodem domino rege in hac parte sequitur præsens hic in cur' pro eodem domino*

domino rege dicit, quod prædicti Johannes Barkstead, Johannes Okey, & Milo Corbet modo comparent sunt eadem personæ, & quilibet eorum est eadem persona in prædicti actu parlamenti nominat qui de alia proditiōe prædicti convicti & attincti existunt, & hoc pro domino rege petit quod inquiretur per patriam, & prædicti Johannes Barkstead, Johannes Okey, & Milo Corbet similiter &c. Ideo immediate veniat inde jurata coram domino rege ibidem &c. Et juratores juratæ prædicti per vicecomit Middlesex prædicti ad hoc impannellati exacti veniunt, qui ad veritatem de præmissis dicend electi triati & jurati dicunt super sacramentum suum, quod prædicti Johannes Barkstead, Johannes Okey, & Milo Corbet sunt eadem personæ, & quilibet eorum est eadem persona in prædicti actu parlamenti nominat qui de alia proditiōe prædicti in actu parlamenti prædicti convicti & attincti existunt, prout prædicti Galfridus Palmer mil. & bar. Attornat domini regis nunc general pro dicti domino rege superius allegavit &c. & ulterius quæsit est de præfatis Johanne Barkstead, Johanne Okey, & Milone Corbet, separatim, si quid ulterius pre se habeant vel dicere velint necne, qui nihil dicunt &c. Ideo considerat est quod prædicti Johannes Barkstead, Johannes Okey, & Milo Corbet ducantur, & quilibet eorum ducatur usque Turrin London, & deinde per medium civitat London directe usque ad furcas de Tyburn trabantur, & quilibet eorum trabatur, & super furcas illas ibidem suspendantur & quilibet eorum suspendatur, & viventes ad terram posternantur, & quilibet eorum prosterantur, & interiora sua extra ventres suos & eorum cujuslibet capiantur, ipsisque viventibus comburantur, & capita eorum & eorum cujuslibet amputentur, & corpora eorum & eorum cujuslibet in quatuor partes dividantur, & quod capita & quarteria illa ponantur ubi dominus rex ea assignare voluerit &c.



The Case of Lord *Griffin*, from a MS. Report of  
the late Lord Chief-Baron *Dod*.

*Pasch.* 7 Annæ 1708.

**L**ORD *Griffin*, who had been outlawed for high treason, was this term brought to the King's Bench; and the whole record of the indictment and-outlawry was read to him, and he was demanded if he had aught to say why execution should not be done; and he not making any material objection the court ordered execution to be done. But note, Sir *James Mountagu* solicitor-general (there being then no attorney-general) prayed, that judgment as in case of high treason might be pronounced; or that at least it might be entered on the roll in the award of execution; and said, that this was the opinion of *Holt* Chief-Justice, then at *Bath propter ægritudinem*. But *Powell* and the court held, that the award of execution should be general; for the judgment in the outlawry implieth all the particulars, and no second judgment ought to be given. And so they said it was holden in the cases of *Holloway* and Sir *Thomas Armstrong*. *Mes per auters dubitatur quia le livre del 1 H. VII. fo. 24. est contra*; and it was said, that in the case of *Barkstead*, *Okey*, and *Corbet* the court followed the precedent of that book.

Execution  
awarded against  
a person out-  
lawed for high  
treason.

The Case of *Elizabeth Harris*.

**A**T *Aylesbury*, Lent assizes 1753, before Mr. Justice *Denison*, *Elizabeth Harris*, a girl of fourteen years of age and of sufficient understanding for her years, was indicted for maliciously setting fire to and burning a dwelling-house in the possession of *Edward Stokes*: and *Anne* the wife of *William Courfe* was indicted as an accessary to the felony before the fact.

Arson by a  
person having  
an interest in  
the house.

The prisoner *Elizabeth* was the daughter of the prisoner *Anne* by a former husband, *John Harris*. It appeared in evidence at the trial, that *John Harris* died seized of the equity of redemption of this house and of another adjoining to it,

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subject

subject to a mortgage-term for 201; and that the equity descended to his eldest son, a child left with other children under the care of their mother the prisoner *Anne*; who was intitled to dower out of these houses, but no dower was ever assigned. That *Anne*, having the care of her son and his estate, let these houses to *Edward Stokes* at the rent of 5*l.* a year, and received the rent for some time; but having a large family of children she was obliged to ask relief of the parish where she lived. That she was denied such relief on account of these houses; the parishioners insisting that the overseers of the poor should be let in to the receipt of the rent, before she should be intitled to any parochial relief. That thereupon she frequently declared, that she would set the houses on fire if the parish did not relieve her; that she had young children whom the parish could not punish, though they might punish her; and that she would order the least child she had who could carry a coal of fire, to burn the houses down. And many other declarations of the like kind she made, which discovered an obstinate resolution in her to burn the houses, rather than submit to the terms the parishioners insisted on.

It appeared farther, that the prisoner *Elizabeth* set the house on fire by the direction of the prisoner *Anne*, who went from home on purpose to be absent at the time the fact was committed; and that no other house was burnt.

The jury found both the prisoners guilty. But a doubt arising by reason of the interest the prisoner *Anne* had in the house, Mr. Justice *Denison* thought proper to respite judgment, in order to take the opinion of the judges on the case.

July the 2d 1753, at a meeting of the judges at the Chief-Justice's chambers it was unanimously agreed, that both the prisoners are guilty of felony. The only doubt was with regard to the interest the prisoner *Anne* had in the house, and it was grounded on the reasoning in *Holmes's* case; for had she had such estate in the house as would have cleared her of the charge of felony, the prisoner *Elizabeth*, who acted by her directions, could not have been guilty of felony.

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But

But all the judges agreed, that the prisoner *Anne's* title to dower was not such an interest as could bring her within the rule in *Holmes's* case. *Holmes* had the possession by legal title, and during the continuance of his lease could maintain his possession against all mankind; and therefore the house might in a limited sense be called *his own*. But in the present case, the possession was in *Edward Stokes* under a demise from *Anne* in behalf of her son, and subject to a yearly rent which she received. And her title to dower, had *Edward Stokes's* interest been out of the case, did not so much as give her a right of entry, it being a bare right of action.

Cro. Car. 376.  
1 Hale 568.

Mr. Justice *Denison* said, that he had no doubt upon him from the beginning. But it being a new case, and some of the bar being doubtful, he thought it advisable to take the opinion of the judges.

At the next assizes judgment of death was pronounced upon both the prisoners, and *Anne* was executed; but *Elizabeth* being young and acting under her mother's direction was reprieved, and recommended to mercy on condition of transportation.

It was said in the debate of this case by some of the judges and not denied by any, that had *Anne* been seized of the freehold and inheritance of the house, and *Stokes* in possession under a lease, it would have been felony in *Anne* to have burnt it: otherwise all tenants and their concerns would be very much at the mercy of their landlords.

The principle three of the judges went upon in *Holmes's* case, (for *Croke* did not concur in the judgment,) doth seem to warrant this opinion. They considered the house then under consideration as the property of *Holmes*, as *his own house*, by reason of the estate he had in it under his lease. *Croke* did not dispute the principle, but argued against the conclusion the other judges drew from it. And if this be so, I do not see why it may not with strict legal propriety be said of a reversioner, who should maliciously set fire to houses in the possession of his tenants under leases from himself or his ancestors, that *he ædes alienas combussit*.

## THE REPORT.

The judgment in *Holmes's* case, to say no more of it, was a very merciful judgment. The house might with strict legal propriety have been considered as the house of the landlord. Both landlord and tenant have a property, one temporary and limited, the other absolute and perpetual; like the bailee and the absolute owner of goods in the case of larceny\*.

The Case of *Anne Lewis*.

2 G. II. c. 25.  
Forgery in the  
name of a per-  
son who never  
existed.

2 Car & K 534

AT the *Old Bailey* sessions in ——— *Anne Lewis* was indicted on the statute of the second of the King for feloniously uttering and publishing a certain false, forged and counterfeit deed, purporting to be a power of attorney from *Elizabeth Tingle* administratrix of her father *Richard Tingle* deceased, late a marine belonging to his Majesty's ship the *Hector*, to *Frederick Predbam* of *Bernard's-inn* gentleman; empowering the said *Predbam* to demand and receive of the commissioners of his Majesty's navy, or whom else it may concern, all prize-money due unto her; with intention to defraud *Edmund Mason*; the said *Anne* knowing the said deed to be false, forged and counterfeit.

The prisoner was convicted upon very full evidence. But it appearing upon the trial that *Richard Tingle*, to whom administration had been taken in the name of *Elizabeth* his supposed daughter, died childless and unmarried, a doubt was conceived, whether, since there never was such person *in rerum naturâ* as *Elizabeth* the daughter of *Richard*, the counterfeiting a letter of attorney in that name and under that description be a forgery within the statute: and upon this doubt judgment was respited.

This doubt arose from what Chief-Justice *Coke* saith, speaking of forgery, in his 3 Inst. 169. "This, saith he, is properly "taken when the act is done *in the name of another person*."

From whence it was inferred, that, there never having been such person as *Elizabeth Tingle* the daughter of *Richard*, the counterfeiting a deed purporting to be executed by such per-

(\* See the cases of *Spalding*, *Breeme* and *Pedley* in *Leach* 193. 195. 209.)

son, cannot come within this definition of the offence; it is not an act done *in the name of another person*.

It was admitted by the learned judge who raised this doubt, (Sir Martin Wright.) that an alteration made in a deed really executed, in order to give it an operation different from the meaning of parties, if it be done *mala fide* and with an intention to defraud, will come within the legal notion of forgery; as antedating a deed of conveyance in order to over-reach a former deed; an alteration in the name and description of the premises conveyed, or in the sum of money secured by bond or other deed, or in the estate intended to pass; these alterations and others of the like nature, made to the prejudice of a third person, and with a fraudulent intention, come within the act on which the present prosecution is founded; in like manner as they have been holden to be within that of the 5th of *Eliz.* For in these instances there was a *false-making*, which is one of the words descriptive of the offence used in both the statutes, that is, the true deed was falsified; but still, said he, there was a real deed on which the forgery did operate.

So in the case of a deed or instrument totally forged, it was said by the same learned judge, that it must purport to be the deed of some person really existing, or that hath existed; whose deed by possibility might have been forged; otherwise it cannot be, according to *Coke's* description of the offence, "An act done *in the name of another person*."

But at a meeting of the judges a few days after *Trinity* term 1754, at Lord Chief-Justice *Ryder's* chambers, eleven judges being present, ten of them were very clearly of opinion, that the prisoner's case is within the letter and meaning of the act; and in that opinion Chief-Justice *Willes*, who was absent, signified his concurrence by letter communicated at that meeting.

In support of this opinion it was argued, that Lord *Coke's* description of the offence, on which the doubt is grounded, is apparently too narrow. It expresseth the most obvious meaning of the word, and taketh in that species of forgery which is most commonly practised; but there are other species of forgery, which will not come within the letter of that description;

the case of antedating, and the other cases which have been mentioned, and are admitted to come within the legal notion of forgery, are of that kind.

The offence the prisoner standeth charged with is the publishing as true a certain false, forged and counterfeit deed, purporting to be a power of attorney from *Elizabeth Tingle*, with an intent to defraud, knowing it to be false. This is her offence, and it is one of the offences described in the act. For it is to be observed, that the act in describing the offence doth not use the words, *the deed of any person*, or *the deed of another*, or any words of the like import, but any false deed. Is the deed in question then a false deed, or is it not? Undoubtedly it is. Was it published with an intention to defraud? It certainly was. This being so, it would sound very harsh to say, that the prisoner's case is not brought within the letter and meaning of the act, because no such person ever existed as *Elizabeth Tingle* the daughter of *Richard*; in other words, because she with an intention to defraud published a deed impossible to be true.

It may be said, *cui bono*; to what purpose will it be to forge deeds or other instruments in the names of persons who never existed? The naked state of the present case answereth that question. Letters of administration to *Richard Tingle* had been taken out in the name of *Elizabeth his supposed daughter*; by these letters an existence in shew and appearance is given to *Elizabeth* the daughter; and this was effected by a gross imposition on the court, and by downright perjury; so that here is a title in shew and appearance established by fraud and perjury in a fictitious person: this title is transferred in shew and appearance by the deed stated in the case: and all this is done with intent to defraud an innocent person. Which clearly bringeth the prisoner's case within the letter and mischief of the act. At the next sessions at the *Old Bailey* (July 17th 1754) the prisoner had judgment of death.

*Note.* After respiting judgment in the case of *Anne Lewis*, and before the judges could meet by reason of the late Chief-Justice *Lee's* frequent indisposition and avocations, two other cases

cases of the like kind and depending on the same doubt came before the court at the *Old Bailey*, and judgment was respited in them. But judgment of death was afterwards given, in conformity to the opinion in *Anne Lewis's* case \*.

### *Mary Mitchell's Case.*

AT the Lent assizes 1754 for the county of *Kent* *Mary Mitchell* was indicted on the statute of the 7th of the King for feloniously uttering and publishing a certain false, forged and counterfeit warrant and order for the delivery of goods, purporting to have been signed by one *George May*, knowing the same to be false, forged, and counterfeit, with intent to defraud one *William Jefferys* of the several goods mentioned in the order: and upon very full evidence she was found guilty: but Mr. Justice *Foster*, before whom she was tried, thought it advisable to respite judgment upon a doubt, whether the order set forth in the indictment be such warrant or order as bringeth the prisoner's case within the statute.

7 G. II. c. 22.  
Forgery of an  
order for deli-  
vering goods.

The prisoner, who was, or pretended to be intitled to parochial relief in the parish of *Maidstone*, went to the shop of the said *William Jefferys*, who sold women's apparel; and pretending that she came from the said *George May*, who was then an overseer of the poor of that parish, produced to Mr. *Jefferys* the order set forth in the indictment; and desired him to let her have the several things mentioned in the order, upon the credit of it. But *Jefferys*, suspecting a forgery, sent the prisoner away, but kept the order, and Mr. *May* having been spoken with, the prisoner was soon afterwards secured.

The order was to this effect.

*Mr. Jefferys,*

*Oct. 16th, 1753.*

*I desire you to let this woman have six yards of ordinary stuff, one pair of stockings, one shift, one apron, one handkerchief, and I will see it all paid for. Witness my hand, George May.*

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(\* See Bolland's case in Leach 78. 358.)

The doubt was, whether this writing be such warrant or order for the delivery of goods as bringeth the case within the meaning of the act; since supposing it to have been genuine, it could have been considered in no other light than as a request from *May* for the delivery of the goods on his credit, and an undertaking on his part to see them paid for. And upon a conference among the judges on the 5th of *July 1754*, at Lord Chief-Justice *Ryder's* chambers, nine of them were clearly of opinion, that this writing is not a warrant or order for the delivery of goods within the meaning of the act. One doubted, but acquiesced; another dissented; Mr. Baron *Legge* was absent.

Those who took the case to be out of the act argued, that the words *warrant or order*, as they stand in the act, are synonymous, and expressive of one and the same idea, and in common parlance import, that the person giving such warrant or order hath, or at least claimeth, an interest in the money or goods which are the subject-matter of that warrant or order; that he hath, or at least assumeth, a disposing power over such money or goods, and taketh on him to transfer the property, or custody of them at least, to the person in whose favour such warrant or order is made. This they took to be the strict literal construction of the act. And though the present case, and many other cases of the like kind mentioned in the debate, may come within the mischiefs intended to be prevented, yet in the construction of acts so penal as this, the old rule of adhering strictly to the letter must not be departed from; and therefore the prisoner ought to be discharged from this indictment.

(Sir Sidney Stafford Smythe.)

2 G. II. c. 15.

The learned judge who dissented argued, that the act of the 7th of the King, on which the question ariseth, was made on purpose to take in the cases which had not been provided for by the former act: and therefore ought to receive a liberal construction. That the word, *order*, is every day used among traders in a larger sense than is now contended for. Letters or messages between dealers, where one desireth the other to send him a quantity of goods in the way of trade, they call *orders*; and yet the person sending this  
order



order hath no interest in the goods, no disposing power over them, nor pretendeth to any.

That had the paper in question been genuine and the goods delivered on the credit of it, *May* would have been liable; or had the goods been delivered on the credit of this paper, *Jefferys* would have been defrauded.

He concluded therefore, that as the present case is within the mischief intended to be prevented, and, as he apprehended, likewise within the words of the act, judgment of death ought to pass upon the prisoner.

At the next assizes the prisoner was called up to the bar, and judgment was given, that she be discharged from this indictment. And there being no other charge against her, she was delivered out of gaol \*.

### The Case of *M<sup>c</sup>Daniel* and Others.

**A**T the *Old Bailey* session in *December 1755* Justice *Foster* (10 St. Tri. 417.) pronounced the judgment of the court in the case between the King and *Macdaniel* and others, to the effect following.

The indictment chargeth, that at the general gaol-delivery holden at *Maidstone* in the county of *Kent*, on the 13th of *August* in the twenty-eighth year of the King, *Peter Kelly* and *John Ellis* were by due course of law convicted of a felony and robbery committed by them in the King's highway in the parish of *Saint Paul Deptford* in the county of *Kent*, upon the person of *James Salmon* one of the prisoners at the bar, and that the prisoners *Stephen Macdaniel*, *John Berry*, *James Eagon*, and *James Salmon*, before the said robbery, did in the parish of *Saint Andrew Holbourn* in this city, feloniously and maliciously comfort, aid, assist, abet, counsel, hire, and command the said *Peter Kelly* and *John Ellis* to commit the said felony and robbery.

Indictment against accessaries before the fact in robbery.

On this indictment the prisoners have been tried, and the jury have found a special verdict to this effect.

Special verdict.

That *Kelly* and *Ellis* were by due course of law convicted of the said felony and robbery.

(\* See the cases of *Lockett*, *Williams*, *Ellor* and *Clinch* in *Leach* 89. 108. 266. 437.)

That

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That before the robbery all the prisoners and one *Thomas Blee*, in order to procure to themselves the rewards given by act of Parliament for apprehending robbers on the highway, did maliciously and feloniously meet at the Bell-Inn in *Holbourn* in this city; and did then and there agree, that the said *Thomas Blee* should procure two persons to commit a robbery on the highway in the parish of *Saint Paul Deptford*, upon the person of the prisoner *Salmon*.

That for that purpose they did all maliciously and feloniously contrive and agree, that the said *Blee* should inform the persons so to be procured, that he would assist them in stealing linen in the parish of *Saint Paul Deptford*.

That in pursuance of this agreement, and with the privity of all the prisoners, the said *Blee* did engage and procure the said *Ellis* and *Kelly* to go with him to *Deptford* in order to steal linen; but did not at any time before the robbery inform them or either of them of the intended robbery.

That in consequence of the said agreement at the Bell, and with the privity of all the prisoners, the said *Ellis* and *Kelly* went with the said *Blee* to *Deptford*.

That the said *Blee*, *Ellis*, and *Kelly* being there, and the prisoner *Salmon* being likewise there waiting in the highway in pursuance of the said agreement, the said *Blee*, *Ellis* and *Kelly* feloniously assaulted him, and took from his person the money and goods mentioned in the indictment.

They farther find, that none of the prisoners had any conversation with the said *Ellis* and *Kelly* or either of them previous to the robbery: but they find, that before the robbery the prisoners *Macdaniel*, *Eagen* and *Berry* saw the said *Ellis* and *Kelly*, and approved of them as persons proper for the purpose of robbing the said *Salmon*.

But whether the prisoners are guilty in manner as charged in the indictment, they pray the advice of the court.

Two questions. This special verdict hath been argued before all the judges of *England*, and two questions have been made.

First,

First, Whether it appeareth from the facts stated in the special verdict, that any robbery was committed by *Ellis* and *Kelly* on the person of *James Salmon*?

Second, Supposing that *Ellis* and *Kelly* were guilty as principals in the robbery, whether the facts found will warrant the court in passing judgment upon the prisoners or any of them upon this indictment?

The second point seemeth to have been the doubt on which the jury pray the advice of the court; and I have reason to believe, that when it first came to be considered, it was matter of great doubt with some gentlemen of the profession, whose abilities were never yet called in question:

What will make a man an accessory before the fact.

For which reason, and because the law touching accessaries before the fact is a matter of great and very extensive consequence to the justice of the kingdom and ought to be well understood, I will deliver my thoughts upon the second question before I come to that which will finally govern the present case.

As to the prisoner *Salmon*, the judges upon consideration of this special verdict are unanimously of opinion, that he cannot be guilty within this indictment: for unless he was party to the agreement at the Bell, there can be no colour to involve him in the guilt of *Ellis* and *Kelly*.

And on the other hand, if he did part with his money and goods in consequence of that agreement, it cannot be said that in legal construction he was robbed at all: since it is of the essence of robbery and larceny, that the goods be taken *against the will of the owner*.

There was a late case cited in the argument on the part of the Crown, which I shall consider by-and-by, and distinguish from the present.

It hath been holden, and I think rightly, that a man may make himself an accessory after the fact to a larceny of his own goods, or to a robbery on himself, by harbouring or concealing the thief, or assisting in his escape.

Crompt. Just. 41. b. pl. 4, 5.

And under some circumstances a man may be guilty of larceny in stealing his own goods, or of robbery in taking his own property from the person of another. *A.* delivereth goods to *B.* to keep for him, and then stealeth them, *with intent*

1 Hale 513.

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Stanf. 26. A.  
3 Inst. 110.

to charge B. with the value of them; this would be felony in A. Or A, having delivered money to his servant to carry to some distant place, disguiseth himself and robbeth the servant on the road, with intent to charge the hundred; this, I doubt not, would be robbery in A.

(Braët. de coron.  
c. 32. Fleta, lib.  
i. c. 38.)

(See Trem. P.  
C. 289.)

For in these cases the money and goods were taken from those who had a special temporary property in them, with a wicked fraudulent intention; which is the ancient known definition of larceny, *fraudulenta contrahatio rei alienæ invito domino*. But I never did hear before this time of any attempt to charge a man as accessary before the fact to a robbery committed on his own person.

As to the prisoners *Macdaniel*, *Berry* and *Eagen*, the judges are unanimously of opinion, that, supposing a robbery was committed on *Salmon*, the facts found by the special verdict are sufficient to charge them as accessaries in the manner they are charged in this indictment.

For the verdict findeth, that every circumstance attending the fact, the place where, and the person on whom it was to be committed, the means by which it was to be effected, and the persons by whom it was to be done; all these circumstances were settled and agreed upon by the prisoners previous to the fact. And in consequence of this consult and agreement the fact was committed.

It is indeed found, that none of the prisoners had any conversation with *Ellis* and *Kelly* previous to the robbery; and that *Blee* did not acquaint *Ellis* and *Kelly* with his intention to commit any robbery, but drew them to *Deptford* under pretence of stealing linen.

These circumstances seem to have been the foundation of the jury's doubt; and the prisoners' counsel have laid great stress on them.

As to that circumstance, that *Blee's* true design was not made known to *Ellis* and *Kelly*, it appeareth manifestly by the facts found, that it was part of the original agreement at the Bell that the true design should be concealed from them; and that they were to be drawn to the place of action under another pretence. This circumstance therefore being part of the original agreement, the prisoners cannot avail themselves of it, if the agreement upon the whole and what was

was done in consequence of it be sufficient to make them accessories.

As to the other circumstance, that the prisoners had no conversation with *Ellis* and *Kelly* before the assault upon *Salmon*, their counsel relied chiefly on the words of the statutes on which this indictment is founded.

The statutes are the 4th and 5th of *Ph.* and *Ma.* and the 3d and 4th of *W.* and *Ma.* The words of the former, which are descriptive of the offence, are, "If any person shall maliciously counsel, hire, or command." The latter retaineth the words counsel, hire, or command, and addeth others, "shall comfort, aid, abet, or assist." From these words, which, it must be admitted, are descriptive of the offence, the prisoners' counsel concluded, That without a personal immediate communication of counsels, intentions, and views, from the supposed accessories to the principals, there can be no accessory before the fact.

4 & 5 P. & M.  
c. 4.  
3 & 4 W. & M.  
c. 9.

But the judges are all of opinion, That whoever procureth a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact, and within these statutes. For what is there in the notion of commanding, hiring, counselling, aiding, or abetting, which may not be effected by the intervention of a third person, without any direct immediate connection between the first mover and the actor?

*A* biddeth his servant hire somebody, no matter whom, to murder *B*, and furnisheth him with money for that purpose; the servant procureth *C*, a person whom *A* never saw, nor heard of, to do it: is not *A*, who is manifestly the first mover or contriver of the murder, an accessory before the fact? It would be a reproach to the justice of the kingdom to suppose he is not.

It is a principle in law which can never be controverted, that he who procureth a felony to be done is a felon. If present he is a principal, if absent an accessory before the fact.

In the case of the Earl of *Somerset*, who was indicted upon the statute of *Ph.* and *Ma.* as an accessory before the fact to the murder of Sir *Thomas Overbury*, the Lord Chancellor *Ellesmere* High Steward, in the outset of the cause and before any evidence given, directed the peers triers, and all the judges

1 St. Tri. 335.

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judges present concurred with his lordship, that the only point in issue was, *whether the Earl caused or procured the murder or not*. And accordingly the Earl was found guilty upon evidence which satisfied his peers, that he had contributed to the murder by the intervention of his lady, and of Sir *Jarvis Elwys*, and *Franklin*, who were themselves no more than accessaries; without any sort of proof that he had ever conversed with *Weston*, the only principal in the murder, or had corresponded with him directly by letter or message.

The best writers on the Crown Law agree, that persons procuring, or even consenting beforehand, are accessaries before the fact.

Lord *Coke* in his comment on *West. 1. c. 14*, in explaining the words *commandment* and *aid* as applied to accessaries before the fact, saith, "Under this word *command* are understood "all those who incite, procure, set on, or stir up any other to "do the fact: and under the word *aid* are comprehended all "persons counselling, abetting, plotting, assenting, consenting, "and encouraging to do the act, and not present when the act "is done."

1 Hale 374.

Id. 615, 616.

Lord *Hale* saith, "Misprision of felony is the concealing "of a felony which a man knows but never consented to; for "if he consented he is either principal or accessory." Again, "An accessory before is he that being absent at the time of "the felony committed doth yet procure, counsel, command, "or abet another, to commit a felony."

Many authorities to this purpose may be cited, which for brevity-sake I will barely refer to \*.

It was objected by the prisoners' counsel, that penal statutes are to be construed with great strictness; and that the words *procure* or *consent* are not to be found in either of the statutes upon which this indictment is formed.

The principle is true, that in prosecutions on penal statutes the words of the statute are to be pursued. But it is equally

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\* See *Stanf.* 40. *Lambard* 287. *edit.* 1588. *Dalt.* c. 161. f. 5. And see *Co. Ent. Appeal*, pl. 5, 6. *Dyer* 120, 186. 1 *And.* 195. *Rafal*, Appeal, pl. 15. Precedents of appeals and indictments against accessaries before the fact, all charging them as procurers of the felony.

true, that we are not to be governed by the sound, but by the well-known, true, legal import of the words.

Some of the words made use of in the present indictment and in one or other of the statutes upon which it is founded are, *command*, *aid*, and *abet*. The passage I have just cited from Lord *Coke* sheweth, that persons procuring, contriving, or consenting come within the words aid and command. And that persons procuring are, in the language of the law, abettors may be proved by many authorities, which it is not necessary to cite at large\*.

This being so, the prisoners *Macdaniel*, *Eagen*, and *Berry*, who were the contrivers of this scene of iniquity, agreed upon the place and manner of execution, and conducted the whole by the intervention of their instrument *Bles*, are accessaries before to this robbery, supposing a robbery to have been committed: for in construction, and indeed in the language of the law, they did command *Ellis* and *Kelly* to commit the fact, and did aid and abet them in it.

I come now to the other question, Whether, upon the state of the case in the special verdict, any robbery, in the legal notion of that offence, was committed on *Salmon* or not.

If goods be taken with the consent of the owner, it is not robbery.

And the judges are of opinion, that it doth not appear, from the facts stated in the verdict, that the taking the money and goods from *Salmon* by *Ellis* and *Kelly* doth amount to a robbery, in the legal notion of that offence.

Something was said in arguing this case upon the question, how far a person charged as an accessory, and brought to his trial after the conviction of the principal, can controvert the truth of the fact found by the verdict against the principal; or how far the supposed accessory can be let in to shew, either that no felony was committed, or that the person convicted as principal was not guilty of it.

This general question is of great extent and of mighty importance in prosecutions of this kind; and some diversity of opinion there is among the judges upon it. (See Disc. III. c. 2. §. 3.)

\* See *Rastal's Terms le Ley*, verb. Abettors. *Stanford*, lib. 3. c. 11. *Westm.* 2. c. 12. *Rastal's Ent. fo.* 43. b. 44. a. *Dyer* 120.

But

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But it will not be necessary at present to enter at all into it; because the court in the present case must found it's judgment upon the facts found by the verdict, and upon them alone. Now it is expressly found, that *Salmon* was party to the original agreement at the Bell; that he consented to part with his money and goods under colour and pretence of a robbery; and that for that purpose, and in pursuance of this consent and agreement, he went to *Deptford*, and waited there till this colourable robbery was effected.

This being the state of the case with regard to *Salmon*, the judges are of opinion, that in consideration of law no robbery was committed on him. His property was not taken from him *against his will*.

Putting in fear  
not necessary.

It was said by the prisoners' counsel, that the verdict doth not find, that *Salmon* was put in fear; and, say they, there can be no robbery without the circumstance of putting in fear.

(See 4 Black.  
c. 17. p. 243.  
and the cases of  
Donnally and  
Hickman in  
Leach 276.231.)

I think the want of that circumstance alone ought not to be regarded. I am not clear, that that circumstance is of necessity to be laid in the indictment, so as the fact be charged to be done *violenter et contra voluntatem*. I know there are opinions in the books which seem to make the circumstance of fear necessary; but I have seen a good MS. note of an opinion of Lord *Holt* to the contrary; and I am very clear, that the circumstance of actual fear at the time of the robbery needeth not to be strictly proved. Suppose the true man is knocked down without any previous warning to awaken his fears, and lieth totally insensible while the thief riflETH his pockets, is not this a robbery? And yet where is the circumstance of actual fear? Or suppose the true man maketh a manful resistance but is overpowered and his property taken from him by the mere dint of superior strength, this doubtless is a robbery. And in cases where the true man delivereth his purse without resistance, if the fact be attended with those circumstances of violence or terror which in common experience are likely to induce a man to part with his property for the safety of his person, that will amount to a robbery: and if fear be a necessary ingredient, the law, *in odium*



*spoliatoris*, will presume fear where there appeareth to be so just a ground for it.

I come now to the case which I promised at the beginning to consider and to distinguish from the present case. One *Norden*, having been informed, that one of the early stage-coaches had been frequently robbed near the town by a single highwayman, resolved to use his endeavours to apprehend the robber. For this purpose he put a little money and a pistol into his pocket, and attended the coach in a post-chaise, till the highwayman came up to the company in the coach and to him, and presenting a weapon demanded their money. *Norden* gave him the little money he had about him, and then jumped out of the chaise with his pistol in his hand; and with the assistance of some others took the highwayman.

The robber was indicted about a year ago in this court for a robbery on *Norden*, and convicted; and very properly, in my opinion, was he convicted.

But that case differeth widely from the present. In that case *Norden* set out with a laudable intention to use his endeavours for apprehending the highwayman, in case he should that morning come to rob the coach, *which at that time was totally uncertain*; and it was equally uncertain whether he would come alone or not. In the case now under consideration there was a most detestable conspiracy between *Salmon* and the rest of the prisoners, that his property should be taken from him under the pretence and shew of a robbery; and time, place, and every other circumstance were known to *Salmon* beforehand, and agreed to by him.

In *Norden's* case there was no concert, no sort of connection between him and the highwayman; nothing to remove or lessen the difficulty or danger *Norden* might be exposed to in the adventure. In the present case there was a combination between *Salmon* and one at least of the supposed robbers, I mean *Blee*: and though *Salmon* might not know the persons of *Ellis* and *Kelly*; yet he well knew, that they were brought to the place by his friend *Blee*, and were wholly under his direction.

So widely do these cases differ!

I

To

To conclude, all the prisoners have been guilty of a most wicked and detestable conspiracy to render a very salutary law subservient to their vile corrupt views. But great as their offence is, it doth not amount to felony: and therefore the judgment of the court is, that they be all discharged of this indictment.

A bill of indictment was afterwards found against all the prisoners, and prosecuted at the expence of the Crown, upon the representation of the judges, for a conspiracy, in which the principal facts found by the special verdict on the felony-bill were charged. On this indictment they were all convicted: and the court gave judgment, that they be all set in and upon the pillory twice; that they stand committed for seven years, and until they find sureties for their good behaviour for three years afterwards.

One of them (*Eagen*) lost his life in the pillory through the resentment of the populace. And on that account the others did not stand a second time; but they are all in *Newgate* very closely confined under their sentence.

What follows  
was not deliver-  
ed in court.

In the case cited in the marginal note, p. 126. from 1 *And.* 195. the indictment was holden to be sufficient, though the words of the statute of *Ph.* and *Ma.* were not pursued; the words *excitavit*, *movit*, & *procuravit* being deemed tantamount to the words of the statute, and descriptive of the same offence.

I take this case to be good law, though I confess it is the only precedent I have met with, where the words of the statute have been totally dropped: and I the rather incline to this opinion, because I observe that the legislature, in statutes made from time to time concerning accessaries before the fact, hath not confined itself to any certain mode of expression; but hath rather chosen to make use of a variety of words, all terminating in the same general idea.

\* 31 Eliz. c. 12.  
f. 5. 21 Jac. c. 6.  
† 23 H. VIII.  
c. 1. f. 3.  
‡ 1 Ed. VI.  
c. 12. f. 13.  
|| 4 & 5 P. & M.  
c. 4.  
§ 39 Eliz. c. 9.  
f. 2.

Some \* statutes make use of the word accessaries, singly, without any other words descriptive of the offence. Others † have the words, abetment, procurement, helping, maintaining and counselling, or, ‡ aiders, abettors, procurers, and counsellors. One || describeth the offence by the words, command, counsel, or hire; another § calleth the offenders,

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protectors, or accessaries. One, \* having made use of the words, comfort, aid, abet, assist, counsel, hire, or command, immediately afterwards in describing the same offence in another case, useth the words counsel, hire, or command only. † One statute calleth them counsellors and contrivers of felonies; and many others make use of the terms counsellors, aiders, and abettors, or barely aiders and abettors.

\* 3 & 4 W. & M. c. 9.

† 1 A. St. 2. c. 9.

From these different modes of expression, all plainly descriptive of the same offence, I think one may safely conclude, that in the construction of statutes, which oust clergy in the case of *participes criminis*, we are not to be governed by the bare sound, but by the true legal import of the words; and also, that every person who cometh within the description of these statutes, various as they are in point of expression, is in the judgment of the legislature an accessary before the fact; unless he is present at the fact, and in that case he is undoubtedly a principal.

Two of these miscreants, *Macdonald* and *Berry*, together with one *Mary Jones*, were afterwards indicted for murder upon a conspiracy of the like nature against one *Kidden*; who was convicted and executed for a robbery on the highway, upon the evidence of *Berry* and *Jones*.

It is not murder to procure the death of another by perjury.

Upon this indictment they were tried, and, the special matter being set forth in the indictment, the court suffered them to be convicted, but immediately respited judgment; in order that the point of law might be more fully considered upon motion in arrest of judgment. But the attorney-general declining to argue the point of law, the prisoners were at a subsequent session discharged of that indictment.

(See 4 Black. c. 24. p. 196. note f.)

This prosecution, I am satisfied, arose from a laudable zeal for keeping the fountains of justice pure and unpolluted; and a just indignation against an offence of this signal enormity.

It must be confessed, that there are strong passages in our antient writers which greatly countenance a prosecution of this kind. But those writers must always be read with great caution upon the subject of homicide.

*Braddon*, whom the writers of that age for the most part follow, was a doctor of both laws before he came to the bench. It is no wonder therefore, that having before him no tolerable system of the *English* law, then in it's infant-state, he should adopt what he found in the books of the civil and canon law, which he had read and seemeth to have well understood \*.

Succeeding writers of that age refined upon *him*, and in their loose way wrote upon the subject rather as divines and casuists than as lawyers; and seem to have considered the offence merely in the light in which it might be supposed to be considered in *foro cæli*.

(See 3 Inst. 48.) But the practice of many ages backwards doth by no means countenance their opinion.

And during all the violence and rage of the prosecution against *Dr. Oates*, it seemeth not to have entered into the imagination of those concerned in it, or of the court, who would not have spared him if they could have taken their full blow at him, that the offences of which he was convicted could have been so charged as to have reached his life: though the judgment they passed on him, the most cruel I believe that ever was given in *Westminster-hall* in case of a misdemeanour, might probably have ended in his death †.

### *Richard Mason's Case.*

Qu. murder or manslaughter?

AT *Winchester* Summer-assizes 1756 *Richard Mason* was indicted before Mr. Serjeant *Willes*, who went judge of assize that circuit, for the wilful murder of *William Mason* his brother; and was upon full evidence convicted to the satisfaction of the serjeant, and judgment of death was passed on him. But the serjeant being informed that some gentlemen of rank at the bar doubted, whether upon the circumstances given in evidence the offence amounted to murder or manslaughter, he respited execution till the opinion of the judges could be taken upon the case, which he reported to have been as followeth.

(See Cod. l. 9. tit. 16. ad legem Corneliam.)

\* See Dig. l. 48. tit. 8. ad legem Corneliam de Sycariis. L. 9. tit. 2. ad legem Aquilianam; and the writers on the canon law, collected by *Linwood*, l. 1. tit. 11. verb. *No Occides*.

† See 4 St. Tri. the proceedings against him, and what fell from the court at the time of giving judgment.

The prisoner, with the deceased and another brother and some neighbours, was drinking in a friendly manner at a publick house; till growing warm in liquor but not intoxicated, the prisoner and the deceased began in idle sport to pull and push each other about the room. They then wrestled one fall, and soon afterwards played at cudgels by agreement.

All this time no tokens of anger appeared on either side, till the prisoner in the cudgel-play gave the deceased a smart blow on the temple. The deceased thereupon grew angry, and throwing away his cudgel closed in with the prisoner, and they fought a short space in good earnest: but the company interposing they were soon parted.

The prisoner then quitted the room in anger; and when he got into the street was heard to say, "Damnation seize me if I do not fetch something and stick him." And being reproved for using such expressions he answered, "I'll be damned to all eternity if I do not fetch something and run him through the body."

The deceased and the rest of the company continued in the room where the affray happened: and in about half an hour the prisoner returned, having put off a slight thin coat he had on when he quitted the room, and put on one of a coarse thick cloth. The door of the room being open into the street, the prisoner stood leaning against the door-post, his left-hand in his bosom and a cudgel in his right, looking in upon the company, but not speaking a word.

The deceased seeing him in that posture invited him into the company; but the prisoner answered, "I will not come in." "Why will you not?" said the deceased. The prisoner replied, "Perhaps you will fall on me and beat me." The deceased assured him he would not; and added, "Besides, you think yourself as good a man as me at cudgels, perhaps you will play at cudgels with me." The prisoner answered, "I am not afraid to do so if you will keep off your fists."

Upon these words the deceased got up and went towards the prisoner, who dropped the cudgel as the deceased was coming up to him. The deceased took up the cudgel and

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with it gave the prisoner two blows on the shoulder. The prisoner immediately put his right-hand into his bosom, and drew out the blade of a tuck-sword crying, "Damn you, stand off or I'll stab you;" and immediately, without giving the deceased time to step back, made a pass at him with the sword, but missed him. The deceased thereupon gave back a little, and the prisoner, shortening the sword in his hand, leaped forward toward the deceased, and stabbed him to the heart, and he instantly died.

The judges having had copies of the case left at their chambers met in *Michaelmas* vacation at Lord *Mansfield's* chambers and unanimously agreed, that there are in this case so many circumstances of deliberate malice and deep revenge on the defendant's part, that his offence cannot be less than wilful murder. He vowed he would fetch something to stick *him*, to run *him* through the body. Whom did he mean by *him*? Every circumstance in the case sheweth he meant his brother. He returned to the company provided to appearance with an ordinary cudgel, as if he intended to try skill and manhood a second time with that weapon; but the deadly weapon was all the while carefully concealed under his coat; which most probably he had changed for the purpose of concealing the weapon.

He stood at the door refusing to come nearer, but artfully drew on the discourse of the past quarrel; and as soon as he saw his brother disposed to engage a second time at cudgels, he dropped his cudgel and betook him to the deadly weapon, which till that moment he had concealed.

He did indeed bid his brother stand off; but he gave him no opportunity of doing so before the first pass was made. His brother retreated before the second, but he advanced as fast, and took the revenge he had vowed.

The circumstance of the blows before the sword was produced, which I presume might weigh with the gentlemen who doubted, altereth not the case at all, nor doth the precedent quarrel; because, all circumstances considered, he appeareth to have returned with a deliberate resolution to take a deadly revenge for what had passed; and the blows were plainly a  
provo-

provocation *sought* on his part, that he might execute the wicked purpose of his heart, with some colour of excuse.

He was soon afterwards executed.

See *Hale's Sum.* 48. and 1 *Hale* 457. two cases of provocations *sought* adjudged murder; though coming "far short of this in point of malignity.

### The Case of *Richard Curtis*.

HE was indicted, at the Summer-assizes 1756 for the Murder of an officer executing process, town and county of *Newcastle upon Tyne*, for the murder of *William Atkinson*.

Upon the trial the case appeared to be, that a process in the nature of a *capias ad satisfaciendum* issued against one *Charles Cowling* out of the town-court, directed to *Joseph Dixon* a serjeant at mace belonging to the court; who got *John Suretees* another serjeant at mace to go and execute it for him. *Suretees* accordingly went to *Cowling's* workshop adjoining to his house, and taking hold of him told him, that he had an execution against him. *Cowling* demanded a fight of the process; which being refused, *Cowling* with the assistance of the prisoner by force and violence rescued himself.

*Suretees* immediately acquainted *Dixon* with what had happened; and thereupon *Dixon* prevailed upon the mayor's officer to insert the name of *Suretees* in the process: and *Suretees* then went before a justice of the peace for the town and county and made information on oath, that he did, by virtue of the said process to him and *Joseph Dixon* directed, apprehend the said *Cowling*, who by wrestling and strokes got out of his hands and made his escape.

The justice thereupon granted a warrant directed to all serjeants at mace, constables, and other officers within the said town and county, reciting the process already mentioned, that *Suretees* had that day arrested *Cowling* by virtue thereof, and that *Cowling* had by wrestling and strokes rescued himself, and commanding all officers &c. to apprehend the said *Cowling*

and

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and to bring him before the justice who granted the warrant, or any other justice of the peace of the town and county, to be dealt with in the premises as the law directeth.

Upon the receipt of this warrant, *Dixon* and *Suretees* (who were both serjeants at mace) went back to *Cowling's* workshop, taking with them the deceased and one *Coulson* as their assistants. They found the shop-door shut, and calling to *Cowling*, who was there with the prisoner, informed him, that they had an escape-warrant against him, and required him to surrender; otherwise they said they would break open the door.

*Cowling* refused to surrender; and the prisoner, looking but at a window with an ax in his hand, swore, that the first man that entered should be a dead man. *Dixon* however with *Coulson* and the deceased broke open the shop-door; and the deceased being foremost in entering the shop, the prisoner at one blow with the ax, on the left side of the head, killed him on the spot.

Upon this evidence the prisoner was found guilty of wilful murder. But some gentlemen of the profession expressing their doubts to the judge who tried him, he respite execution till the opinion of the other judges could be had on the case.

In *Trinity* term 1757 eleven of the judges had a conference on the case, and nine of them, with whom justice *Wilmot* who was absent concurred, were clearly of opinion, that the defendant is guilty of murder. Two of the judges held it to be manslaughter. All the judges present at the conference agreed, that the justice's warrant, though obtained by very unwarrantable practice on the part of *Dixon*, and by perjury on the part of *Suretees*, was a legal warrant for the arresting *Cowling* for a breach of the peace. For in cases wherein the justice of the peace hath jurisdiction, and in this he undoubtedly had, the legality of his warrant will never depend on the truth of the information whereon it is grounded.

They likewise agreed, that peace-officers, having a legal warrant to arrest for a breach of the peace, may break open doors, after having demanded admittance and given due notice of their warrant.

The



The point on which they divided was, whether in this case such due notice had been given.

The nine judges were of opinion, that no precise form of words is required in a case of this kind. It is sufficient that the party hath notice, that the officer cometh not as a mere trespasser, but claiming to act under a proper authority: and if, after this notice, he be resisted, and he or any of his assistants killed in consequence of such resistance, it will be murder; provided it cometh out in evidence *that the officer had a legal warrant*.

The person making such resistance, after such notice, doth it at his own peril. He acteth avowedly and deliberately in defiance of the ordinary course of justice: and therefore it will be no excuse on his part to say, that he did not know or believe that the officer came armed with a proper authority. This rule is founded on the policy of the law, and upon every principle of government.

The judges who differed thought, that the officers ought to have declared in an explicit manner what sort of warrant they had.

They said, that an escape doth not *ex vi termini*, nor in the notion of law, imply any degree of force or breach of the peace; and consequently the prisoner had not due notice, that they came under the authority of a warrant grounded on a breach of the peace: and for want of this due notice the officers are not to be considered as acting in discharge of their duty, but as mere trespassers.

On this question alone the case turned.

But a few of the judges, who conceived the fact to be murder, were of opinion, that it would have been so, even admitting that the officers could not have justified the breaking open the door. Here was no arrest actually made, the officers, even admitting that due notice had not been given, had committed a bare trespass in the house of *Cowling*, where the prisoner happened to be; no trespass done to the property of the prisoner; no attempt on his person.

But admitting that a trespass in the house, with an intent to make an unjustifiable arrest on the owner, could be considered as some provocation to a bystander; yet surely the knocking a man's brains out, or cleaving him down with an ax on so slight

flight a provocation, favoureth rather of brutal rage, or, to speak more properly, of diabolical mischief, than of human frailty. And it ought always to be remembered, that, in all cases of homicide on sudden provocation, the law indulgeth to human frailty, *and to that alone.*

Besides, the circumstance of the prisoner's standing with the ax in his hand, declaring before any attempt to enter the shop, "that the first man that did enter should be a dead man," sheweth it to be an act of deliberation as well as cruelty.

And where the circumstances of deliberation and cruelty concur, as they do in this case, the fact is undoubtedly murder; as flowing from a wicked heart, a mind grievously depraved, and acting from motives highly criminal. Which is the genuine \* notion of malice in our law.

Cro. Car. 371.  
Jones (W.) 346.  
Kel. 59.

In the cases of Sir *H. Ferrers's* servant and of *Hopkin Hugget*, which were mentioned on this occasion, there was a mutual combat, blows given or passes made on each side; the parties fought upon equal terms: and when that is the case, be the original provocation ever so slight, every blow or pass becometh a fresh provocation; the blood kindleth every moment, and in the tumult of the passions the voice of reason is not heard.

L. Raym. 1296.

I must confess, that the circumstance of a mutual combat was wanting in the case of *The Queen* against *Tooly and others*, which was likewise mentioned on this occasion; but that case, I speak it with great deference, standeth, as I conceive, on no better grounds than the opinion of seven learned judges against five †.

### In the Case of Earl *Ferrers*, April 17, 1760.

See the printed trial.  
A peer convicted of murder ought to receive judgment according to stat. 25 Geo. II. c. 37;

THE House of Peers unanimously found Earl *Ferrers* guilty of the felony and murder whereof he stood indicted; and the Earl being brought to the bar, the High Steward acquainted him therewith: and the House immediately ad-

\* See Discourse II. towards the beginning.

† See the Discourse on Homicide, chap. 8. sect. 10.

journe'd

journed to the chamber of Parliament, and having put the following questions to the judges adjourned to the next day.

and if execution should not be done on the day appointed a new time may be appointed.

1st, " Whether a Peer indicted of felony and murder, and  
" tried and convicted thereof before the Lords in Parliament,  
" ought to receive judgment for the same, according to the  
" provisions of the act of Parliament of the 25th year of his  
" Majesty's reign, intituled *An act for better preventing the hor-  
" rid crime of murder* ?

2d, " Supposing a Peer so indicted and convicted ought by  
" law to receive such judgment as aforesaid, and the day ap-  
" pointed by the judgment for execution should lapse before  
" such execution done, whether a new time may be appointed  
" for the execution, and by whom ?"

On the 18th, the House then sitting in the chamber of Par-  
liament, the Lord Chief-Baron, in the absence of the Chief-  
Justice of the Common Pleas, delivered in writing the opinion  
of the judges, which they had agreed on and reduced into form  
that morning.

(Sir Thomas  
Parker.)

His Lordship added many weighty reasons, in support of the  
opinion, which he urged with great strength and propriety, and  
delivered with a becoming dignity.

To the first question.

" We are all of opinion, that a Peer indicted of felony and  
" murder, and tried and convicted thereof before the Lords  
" in Parliament, ought to receive judgment for the same  
" according to the provisions of the act of Parliament of the  
" 25th year of his Majesty's reign, intituled *An act for better  
" preventing the horrid crime of murder.*"

To the second question.

" Supposing the day appointed by the judgment for execution  
" should lapse before such execution done (which however the  
" law will not presume), We are all of opinion, that a new  
" time may be appointed for the execution *either by the High  
" Court of Parliament before which such Peer shall have  
" been attainted*, or by the court of King's Bench, the Par-  
" liament

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“ liament not then sitting; the record of the attainder being properly removed into that court.”

The reasons the judges went upon in their answer to the first question are, I presume, too obvious to be mentioned at large; and the House resolved and ordered, That judgment shall be pronounced in *Westminster-hall* pursuant to the late act.

The reasons upon which the judges founded their answer to the second, relating to the farther proceedings of the House after the High Steward's commission dissolved, which is usually done upon pronouncing judgment, may possibly require some farther discussion. I will therefore, before I conclude, mention those which weighed with me, and, I believe, with many others of the judges.

The House, before they adjourned to the court-room in *Westminster-hall* for pronouncing judgment, resolved and ordered, That execution be respited to the 5th day of *May* following. Upon which day execution was done at *Tyburn* pursuant to the judgment, and the body delivered at Surgeons-hall to be dissected and anatomized.

The writ to the sheriffs for execution was as followeth.

*George the second, by the grace of God of Great Britain, France, and Ireland King, defender of the faith and so forth, To the sheriffs of London and sheriff of Middlesex, Greeting : Whereas Lawrence Earl Ferrers viscount Tamworth hath been indicted of felony and murder by him done and committed, which said indictment hath been certified before us in our present Parliament; and the said Lawrence Earl Ferrers viscount Tamworth hath been thereupon arraigned, and upon such arraignment hath pleaded not guilty; and the said Lawrence Earl Ferrers viscount Tamworth hath before us in our said Parliament been tried, and in due form of law convicted thereof; and whereas judgment hath been given in our said Parliament, that the said Lawrence Earl Ferrers viscount Tamworth shall be hanged by the neck till he is dead, and that his body be dissected and anatomized, the execution of which judgment yet remaineth to be done,*

*done, we require, and by these presents strictly command you, that upon Monday the 5th day of May instant, between the hours of nine in the morning and one in the afternoon of the same day, him the said Lawrence Earl Ferrers viscount Tamworth without the gate of our Tower of London (to you then and there to be delivered as by another writ to the lieutenant of our Tower of London, or to his deputy directed, we have commanded) into your custody you then and there receive, and him in your custody so being you forthwith convey to the accustomed place of execution at Tyburn, and that you do cause execution to be done upon the said Lawrence Earl Ferrers viscount Tamworth in your custody so being, in all things according to the said judgment. And this you are by no means to omit at your peril. Witness ourself at Westminster the second day of May, in the 33d year of our reign.*

YORKE and YORKE.

#### Reasons &c.

Every proceeding in the House of Peers acting in it's judicial capacity, whether upon writ of error, impeachment, or indictment removed thither by *certiorari*, is in judgment of law a proceeding before the *King in Parliament*: and therefore the House in all those cases may not improperly be stiled, The court of our Lord the King in Parliament.

This court is founded upon immemorial usage, upon the law and custom of Parliament, and is part of the original system of our constitution.

It is open for all the purposes of judicature during the continuance of the Parliament: it openeth at the beginning, and shutteth at the end of every session; just as the court of King's Bench, which is likewise in judgment of law holden before the King himself, openeth and shutteth with the term.

The authority of this court, or, if I may use the expression, it's constant activity for the ends of publick justice independent of any special powers derived from the Crown, is not doubted in the case of writs of error from those courts of law whence error lieth in Parliament, and of impeachments for misdemeanors.

It

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It was formerly doubted, whether in the case of an impeachment for treason, and in the case of an indictment against a Peer for any capital crime removed into Parliament by *certiorari*,—whether in these cases the court can proceed to trial and judgment without an High Steward appointed by special commission from the Crown.

This doubt seemeth to have arisen from the not distinguishing between a proceeding in the court of the High Steward, and that before the King in Parliament. The name, stile, and title of office is the same in both cases, but the offices, and the powers and preeminences annexed to them, differ very widely; and so doth the constitution of the courts where the offices are executed. The identity of the name may have confounded our ideas, as equivocal words often do if the nature of things is not attended to; but the nature of the offices properly stated will, I hope, remove every doubt on these points.

In the court of the High Steward, he alone is judge in all points of law and practice; the Peers triers are merely judges of fact, and are summoned by virtue of a precept from the High Steward to appear before him on the day appointed by him for the trial, *Ut rei veritas melius sciri poterit*.

The High Steward's commission, after reciting that an indictment hath been found against the Peer by the grand jury of the proper county, empowereth him to send for the indictment, to convene the prisoner before him at such day and place as he shall appoint; then and there to hear and determine the matter of such indictment; to cause the Peers triers *tot & tales per quos rei veritas melius sciri poterit*, at the same day and place to appear before him; *veritateque inde comperta*, to proceed to judgment according to the law and custom of *England*, and thereupon to award execution\*.

By this it is plain, that the sole right of judicature is in cases of this kind vested in the High Steward; that it resideth solely in his person; and consequently without this commission, which is but in nature of a commission of *oyer and terminer*, no one step can be taken in order to a trial: and that when his

\* See Lord Clarendon's commission as High Steward, and the writs and precepts preparatory to the trial in Lord Morley's case. 7 St. Tr. 420, 423.

commission is dissolved, which he declareth by breaking his staff, the court no longer existeth.

But in a trial of a Peer in full Parliament, or, to speak with legal precision, before the King in Parliament, for a capital offence, whether upon impeachment or indictment, the case is quite otherwise. Every Peer present at the trial, (and every temporal Peer hath a right to be present in every part of the proceeding,) voteth upon every question of law and fact; and the question is carried by the major vote; the High Steward himself voting merely as a Peer and member of that court in common with the rest of the Peers, and in no other right.

It hath indeed been usual, and very expedient it is in point of order and regularity, and for the solemnity of the proceeding, to appoint an officer for presiding during the time of the trial and until judgment, and to give him the stile and title of Steward of *England*. But this maketh no sort of alteration in the constitution of the court. It is the same court founded in immemorial usage, in the law and custom of Parliament, whether such appointment be made or not.

It acteth in it's judicial capacity in every order made touching the time and place of the trial, the postponing the trial from time to time upon petition according to the nature and circumstances of the case, the allowance or non-allowance of counsel to the prisoner, and other matters relative to the trial; and all this before an High Steward hath been appointed\*. And so little was it apprehended in some cases, which I shall mention presently, that the existence of the court depended on the appointment of an High Steward, that the court itself directed in *what manner and by what form of words he should be appointed*. It hath likewise received and recorded the prisoner's confession, which amounteth to a conviction, before the appointment of an High Steward, and hath allowed to prisoners the benefit of acts of general pardon, where they appeared intitled to it, as well without the appointment of an High Steward, as after his commission dissolved.

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\* See the orders previous to the trial in the cases of the Lords *Kilmarnock* &c. and Lord *Levas*, and many other modern cases.

And

And when, in the case of impeachments, the commons have sometimes at conferences between the Houses attempted to interpose in matters preparatory to the trial, the general answer hath been, "This is a point of *judicature* upon which the "Lords will not confer, they impose silence upon themselves," or to that effect. I need not here cite instances; every man who hath consulted the Journals of either House hath met with many of them.

I will now cite a few cases applicable, in my opinion, to the present question: and I shall confine myself to such as have happened since the restoration; because in questions of this kind, modern cases, settled with deliberation and upon a view of former precedents, give more light and satisfaction than the deepest search into antiquity can afford; and also because the prerogatives of the Crown, the privileges of Parliament, and the rights of the subject in general, appear to me to have been more studied and better understood at, and for some years before that period, than in former ages.

**Lords' Journal.**

In the case of the Earl of *Danby* and the popish Lords then under impeachments, the Lords on the 6th of *May* 1679 appointed time and place for hearing the Earl of *Danby* by his counsel upon the validity of his plea of pardon, and for the trials of the other Lords; and voted an address to his Majesty praying that he would be pleased to appoint an High Steward for those purposes.

These votes were on the next day communicated to the Commons by message in the usual manner.

On the 8th, at a conference between the Houses upon the subject-matter of that message, the Commons expressed themselves to the following effect, "They cannot apprehend what should induce your Lordships to address his Majesty for an High Steward for determining the validity of the pardon which hath been pleaded by the Earl of *Danby*, as also for the trial of the other five Lords, "because they conceive the constituting an High Steward "is not necessary, but that judgment may be given in Parliament upon an impeachment without an High Steward;" and concluded with a proposition, that for avoiding any interruption or delay a committee of both Houses might be



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be nominated to consider of the most proper ways and methods of proceeding.

This proposition the House of Peers after a long debate rejected.

*Dissentientibus, Finch* \* Chancellor, and many other Lords.

However on the 11th the Commons' proposition of the 8th was upon a second debate agreed to, and the Lord Chancellor, Lord President, and ten other Lords were named of the committee, to meet and confer with a committee of the Commons.

The next day the Lord President reported, that the committees of both Houses met that morning, and made an entrance into the business referred to them; that the Commons desired to see the Commissions which are prepared for an High Steward at these trials, and also the Commissions in the Lord *Pembroke's*, and the Lord *Morley's* cases.

That to this the Lords Committees said, "The High Steward is but Speaker *pro tempore*, and giveth his vote as well as the other Lords: this changeth not the nature of the court." And the Lords declared, "That they have power enough to proceed to trial, though the King should not name an High Steward †."

That this seemed to be a satisfaction to the Commons provided it was entered in the Lords' Journals, which are records.

Accordingly on the same day, "It is declared and ordered by the Lords spiritual and temporal in Parliament assembled, that the office of an High Steward upon trials of Peers upon impeachments is not necessary to the House of Peers; but that the Lords may proceed in such trials if an High Steward be not appointed according to their humble desire †."

\* Afterwards Earl of Nottingham.

† In the Commons' Journal of the 15th of May it standeth thus, Their Lordships farther declared to the committee, that a Lord High Steward was made *hoc vice* only; that notwithstanding the making of a Lord High Steward the court remained the same and was not thereby altered, but still remained the court of Peers in Parliament; that the Lord High Steward was but as a speaker or chairman for the more orderly proceeding at the trials.

† This resolution my Lord Chief-Baron referred to and cited in his argument upon the second question proposed to the judges, which is before stated.

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On the 13th the Lord President reported, that the committees of both Houses had met that morning and discoursed in the first place on the matter of a Lord High Steward, and had perused former commissions for the office of High Steward: and then putting the House in mind of the order and resolution of the preceeding day, he proposed from the committees, that a new commission might issue so as the words in the commission may be thus changed, *viz.* instead of, *ac pro eo quod officium Seneschalli Angliæ (cujus præsentia in hac parte requiritur) ut accepimus jam vocat,* may be inserted, *ac pro eo quod procures & magnates in parlamento nostro assembleti nobis humiliter supplicaverunt ut Seneschallum Angliæ pro hac vice constituere dignaremur,* to which the House agreed \*.

It must be admitted, that precedents drawn from times of ferment and jealousy, as these were, lose much of their weight; since passion and party-prejudice generally mingle in the contest. Yet let it be remembered, that these are resolutions in which both Houses concurred, and in which the rights of both were thought to be very nearly concerned; the Commons' right of impeaching with effect, and the whole judicature of the Lords in capital cases: for if the appointment of an High Steward was admitted to be of absolute necessity, (however necessary it may be for the regularity and solemnity of the proceeding during the trial and until judgment, which I do not dispute,) every impeachment may, for a reason too obvious to be mentioned, be rendered ineffectual; and the judicature of the Lords, in all capital cases, nugatory.

It was from a jealousy of this kind, not at that juncture altogether groundless, and to guard against every thing from whence the necessity of an High Steward in the case of an impeachment might be inferred, that the Commons proposed and the Lords readily agreed to the amendment in the Steward's commission which I have already stated: and it hath, I confess, great weight with me, that this amendment, which

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\* This amendment arose from an exception taken to the commission by the committee for the Commons, which, as it then stood, did in their opinion imply, that the constituting a Lord High Steward was necessary. Whereupon it was agreed by the whole committee of Lords and Commons, that the commission should be recalled, and a new commission, according to the said amendment, issue to bear date after the order and resolution of the 13th. (Commons' Journal of the 15th of May).

was at the same time directed in the cases of the five Popish Lords when commissions should pass for their trials, hath taken place in every commission upon impeachments for treasons since that time \*. And I cannot help remarking, that in the case of Lord *Lovat*, when neither the heat of the times, nor the jealousy of parties had any share in the proceeding, the House ordered, "That the commission for appointing a Lord High Steward shall be in the like form as that for the trial of the Lord Viscount *Stafford*, as entered in the Journal of this House the 30th of *November* 1680, except that the same shall be in the *English* Language †."

I will make a short observation on this matter.

The order on the 13th of *May* 1679 for varying the form of the commission was, as appeareth by the Journal, plainly made in consequence of the resolution of the 12th, and was founded on it; and consequently the constant unvarying practice, with regard to the new form, goeth, in my opinion, a great way towards shewing, that, in the sense of all succeeding times, that resolution was not the result of faction or a blameable jealousy, but was founded in sound reason and true policy.

It may be objected, that the resolution of the 12th of *May* 1679 goeth no farther than to a proceeding upon impeachment.

The letter of the resolution, it is admitted, goeth no farther, but this is easily accounted for. A proceeding by impeachment was the subject-matter of the conference, and the Commons had no pretence to interpose in any other. But what say the Lords? *The High Steward is but as a Speaker or Chairman PRO TEMPORE for the more orderly proceeding at the trials; the appointment of him doth not alter the nature of the court, which still remaineth the court of the Peers in Parliament.* From these premises they draw the conclusion I have mentioned. Are not these premises equally true in the case of a proceeding upon indictment? They undoubtedly are.

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\* See in the State Trials the commissions in the cases of the Earl of *Oxford*, Earl of *Derwentwater* and others, Lord *Winton*, and Lord *Lovat*.

† See the proceedings printed by order of the House of Lords. (4to. Feb. 1746).

## THE REPORT.

It must likewise be admitted, that in the proceeding upon indictment the High Steward's commission hath never varied from the antient form in such cases; the words objected to by the Commons, *Ac pro eo quod officium Seneschalli Angliæ (cujus presentia in hac parte requiritur) ut accepimus jam vacat*, are still retained. But this proveth no more than that the great seal, having no authority to vary in point of form, hath from time to time very prudently followed antient precedents.

I have already stated the substance of the commission in a proceeding in the court of the High Steward. I will now state the substance of that in a proceeding in the court of the Peers in Parliament; and shall make use of that in the case of the Earl of Kilmarnock and others, as being the latest and in point of form agreeing with the former precedents.

The commission, after reciting that *William Earl of Kilmarnock &c.* stand indicted before commissioners of gaol-delivery in the county of *Surry* for high treason in levying war against the King, and that the King intendeth that the said *William Earl of Kilmarnock &c.* shall be heard, examined, sentenced, and adjudged before *himself in this present Parliament* touching the said treason, and for that the office of Steward of *Great Britain (whose presence is required upon this occasion)* is now vacant as we are informed, appointeth the then Lord Chancellor Steward of *Great Britain* to bear, execute, and exercise (for this time) the said office with all things due and belonging to the same office *in that behalf*.

What therefore are the things due and belonging to the office *in a case of this kind*? Not, as in the court of the High Steward, a right of judicature: for the commission itself supposeth that right to reside in a court then subsisting before the King in Parliament. The parties are to be *there* heard, sentenced, and adjudged. What share in the proceeding doth the High Steward then take? By the practice and usage of the court of the Peers in Parliament he giveth his vote as a member thereof with the rest of the Peers; but for the sake of regularity and order he presideth during the trial and until judgment as Chairman, or Speaker *pro tempore*. In that respect therefore it may be properly enough said, that his

his presence is required during the trial and until judgment, *and in no other*. Herein I see no difference between the case of an impeachment and of an indictment.

I say during the time of the trial and until judgment, because the court hath, as I observed before, from time to time done various acts plainly judicial before the appointment of an High Steward; and where no High Steward hath ever been appointed, and even after the commission dissolved.

I will to this purpose cite a few cases.

I begin with the latest, because they are the latest, and were ruled with great deliberation, and for the most part upon a view of former precedents.

In the case of the Earl of *Kilmarnock* and others, the Lords, on the 24th of June 1746, ordered that a writ or writs of *certiorari* be issued for removing the indictments before the House; and on the 26th the writ, *which is made returnable before the King in Parliament*, with the return and indictments, was received and read. On the next day upon the report of the Lords Committees, that they had been attended by the two Chief-Justices and Chief-Baron, and had heard them touching the construction of the act of the VIIth and VIIIth of King *William* "for regulating trials in cases of treason and misprision of treason," the House upon reading the report came to several resolutions founded for the most part on the construction of that act. What that construction was appeareth from the Lord High Steward's address to the prisoners just before their arraignment. Having mentioned that act as one happy consequence of the revolution he addeth, "How-  
" ever injuriously that revolution hath been traduced, whatever  
" attempts have been made to subvert this happy establishment  
" founded upon it, your Lordships will now have the benefit  
" of that law in it's full extent."

Vid. proceedings in print.

Printed trial,  
p. 12.

I need not after this mention any other judicial acts done by the House in this case before the appointment of the High Steward; many there are: for the putting a construction upon an act relative to the conduct of the court, and the right of the subject at the trial and in the proceedings preparatory to

it; and this in a case entirely new, and upon a point, to say no more in this place, *not extremely clear*, was undoubtedly an exercise of authority proper only for a court having full cognizance of the cause.

I will not minutely enumerate the several orders made preparatory to the trial of Lord *Lovat*, and in the several cases I shall have occasion to mention, touching the time and place of the trial, the allowance or non-allowance of counsel, and other matters of the like kind, all plainly judicial, because the like orders occur in all the cases where a journal of the preparatory steps hath been published by order of the Peers. With regard to Lord *Lovat*'s case, I think the order directing the form of the High Steward's Commission, which I have already taken notice of, is not very consistent with the idea of a court whose powers can be supposed to depend at any point of time upon the existence or dissolution of that commission.

In the case of the Earl of *Derwentwater* and the other Lords impeached at the same time, the House received and recorded the confessions of those of them who pleaded guilty long before the *teste* of the High Steward's Commission; which issued merely for the solemnity of giving judgment against them upon their conviction.

See the proceedings in print.

This appeareth by the commission itself; it reciteth that the Earl of *Derwentwater* and others *coram nobis in præsentî Parlamento* had been impeached by the Commons for high treason, and had *coram nobis in præsentî Parlamento* pleaded guilty to that impeachment, and that the King intended that the said Earl of *Derwentwater* and others *de & pro proditiõne unde ipsi ut præfertur impetit' accusat' & convict' existunt coram nobis in præsentî Parlamento, secundum legem & consuetudinem hujus regni nostri Magnæ Britanniæ, audiantur, sententientur, & adjudicentur*, and then constituteth the then Lord Chancellor High Steward (*hac vice*) to do and execute all things which to the office of High Steward in that behalf do belong.

The receiving and recording the confession of the prisoners, which amounted to a conviction so that nothing remained but proceeding to judgment, was certainly an exercise of judicial authority, which no assembly how great

foever, not having full cognizance of the cause, could exercise.

In the case of Lord *Salisbury*, who had been impeached by the Commons for High Treason, the Lords upon his petition allowed him the benefit of the act of general pardon passed in the second year of *William and Mary*, so far as to discharge him from his imprisonment, upon a construction they put upon that act, *no High Steward ever having been appointed in that case.*

See the Journals of the Lords.

2 W. and M. Sess. 1. c. 10.

On the 2d Oct. 1690, upon reading the Earl's petition setting forth that he had been a prisoner for a year and nine months in the Tower notwithstanding the late act of free and general pardon, and praying to be discharged, the Lords ordered the Judges to attend on the *Monday* following to give their opinions, Whether the said Earl be pardoned by the act. On the 6th the Judges delivered their opinions, That if his offence was committed before the 13th of Feb. 1688, and not in *Ireland* or beyond the seas, he is pardoned. Whereupon it was ordered that he be admitted to bail; and the next day he and his sureties entered into a recognizance of bail, himself in 10,000*l.* and two sureties in 5000*l.* each; and on the 30th he and his sureties were, after a long debate, discharged from their recognizance.

It will not be material to inquire, whether the House did right in discharging the Earl without giving the Commons an opportunity of being heard; since in fact they claimed and exercised a right of judicature without an High Steward, which is the only use I make of this case.

They did the same in the case of the Earl of *Carnwarth*, and the Lords *Widdrington* and *Nairn*, long after the High Steward's Commission dissolved.

These Lords had judgment passed on them at the same time that judgment was given against the Lords *Derwentwater*, *Nithsdale*, and *Kenmure*; and judgment being given, the High Steward immediately broke his staff, and declared the commission dissolved. They continued prisoners in the Tower under reprieves till the passing the act of general pardon in the third of King *GEORGE* the first.

Lords' Journal.

On the 21st of *November* 1717, the House being informed that these Lords had severally entered into recognizances before one of the judges of the court of King's Bench for their appearance in the House in this Session of Parliament, and that the Lords *Carnwarth* and *Widdrington* were attending accordingly, and that the Lord *Nairn* was ill at *Bath* and could not then attend, the Lords *Carnwarth* and *Widdrington* were called in; and they severally at the bar prayed, that their appearance might be recorded, and likewise prayed the benefit of the act for his Majesty's general and free pardon.

3 G. I. c. 19.

Whereupon the House ordered that their appearance be recorded; and that they attend again to-morrow in order to plead the pardon. And the recognizance of the Lord *Nairn* was respited till that day fortnight.

On the morrow the Lords *Carnwarth* and *Widdrington* then attending were called in, and the Lord Chancellor acquainted them severally, that it appeared by the records of the House that they severally stood attainted of high treason, and asked them severally what they had to say why they should not be remanded to the *Tower of London*.

Thereupon they severally upon their knees prayed the benefit of the act, and that they might have their lives and liberty pursuant thereunto.

And the Attorney-General, who then attended for that purpose, declaring that he had no objection on his Majesty's behalf to what was prayed, conceiving that those Lords not having made any escape since their conviction were intitled to the benefit of the act, the House, after reading the clause in the act relating to that matter, agreed that they should be allowed the benefit of their pardon as to their lives and liberties, and discharged their recognizances; and gave them leave to depart without farther day given for their appearance.

See stat. 45. 68  
3 G. I. c. 19.

On the 6th of *December* following the like proceedings were had, and the like orders made in the case of Lord *Nairn*.

I observe that the Lord Chancellor did not ask these Lords, What they had to say, *why execution should not be awarded*. There was, it is probable, some little delicacy as to that point. But since the allowance of the benefit of the act



as to life and liberty, which was all that was prayed, was an effectual bar to any future imprisonment on that account, and also to execution, and might have been pleaded as such in any court whatsoever, the whole proceeding must be admitted to have been in a court having complete jurisdiction in the case, notwithstanding the High Steward's commission had been long dissolved. Which is all the use I intended to make of this case.

I will not recapitulate; the cases I have cited, and the conclusions drawn from them are brought into a very narrow compass. I will only add, that it would sound extremely harsh to say, that a court of criminal jurisdiction founded in immemorial usage, and holden in judgment of law before *the King himself*, can, in any event whatever, be under an utter incapacity of proceeding to trial and judgment either of condemnation or acquittal, the ultimate objects of every criminal proceeding, without certain supplemental powers derived from the Crown.

These cases, with the observations I have made on them, I hope, sufficiently warrant the opinion of the judges upon that part of the second question in the case of the late Earl *Ferrers* which I have already mentioned; and also what was advanced by the Lord Chief-Baron in his argument on that question, "That though the office of High Steward should happen to determine before execution done according to the judgment, yet the court of the Peers in Parliament, where that judgment was given, would subsist for all the purposes of justice during the sitting of the Parliament:" and consequently that in the case supposed by the question, that court might appoint a new day for the execution.

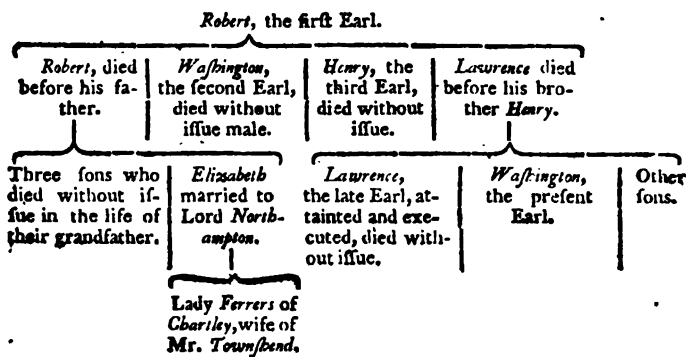
*N. B.* On the 19th of May 1760 *Washington Earl Ferrers*, next brother to the late Earl, having received his writ of summons, took his seat in Parliament as Earl *Ferrers*.

The family pedigree, as far as concerneth the present case, is as followeth.

*Robert* the first Earl, who in the 29th of *Charles II.* was summoned to Parliament by the title of Lord *Ferrers of Chartley*, being grandson and heir to *Dorothy* sister and coheir to  
*Robert*

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*Robert D'Evereux* Earl of *Essex* the Parliament-General, was in the 10th of Queen *Anne* created Viscount *Tamworth* and Earl *Ferrers*, to him and the heirs-male of his body.

The Case of *Alexander Broadfoot*,

## ADVERTISEMENT.

*THIS* case, though already in print, hath been thought to deserve a place in this collection. It is therefore here inserted.

If it be asked, where are the adjudged cases on which the author groundeth his opinion? he freely confesseth, that he hath not met with one, in which the legality of pressing for the sea-service hath directly come in judgment. What this is to be imputed to every reader will judge. A few modern cases there are, from which the legality of the practice may be inferred. But the author chose to ground himself on much better authorities than inferences from modern reports.

(See Kel. 59.  
136. 137.  
Comb. 245.  
Cowp. 512.)

Not murder, but manslaughter, to kill a sailor belonging to a press-gang, which had not a legal warrant.

AT the gaol-delivery holden for the city and county of the city of *Bristol*, August 30, 1743, *Alexander Broadfoot* was indicted for the murder of *Cornelius Calaban* a sailor belonging to his Majesty's ship the *Mortar Sloop*.

The case was thus; Captain *Hanway*, commander of the *Mortar Sloop*, had a warrant from the Lords of the Admiralty, grounded

grounded on an order of his Majesty in council, empowering him to impress, or cause to be impressed, seamen for his Majesty's service. The warrant expressly directeth, "That the captain shall not intrust any person with the execution of it, but a commission-officer; and shall insert the name and office of the person intrusted on the back of the warrant."

The Lieutenant of the *Mortar Sloop* (the only commission-officer on board besides the captain) was deputed by him to impress according to the tenor of the warrant.

On the 25th of *April* last Captain *Hanway*, being at anchor in *Kingroad* within the port and county of *Bristol*, ordered the ship's boat down the channel in order to press as they should see opportunity. But the lieutenant staid in *Kingroad*, on board with the captain.

Towards evening, the boat came up with a merchant-man, the *Bremen Factor*, homeward-bound, in that part of the channel which is within the county of the city of *Bristol*, but some leagues from *Kingroad*; and some of the crew went on board, in order to press; who being informed that one or two of the *Bremen's* men were concealed in the hold, *Calaban*, with three others of the boat's crew, went thither in search of them. Whereupon *Broadfoot*, one of the *Bremen's* men, (who had before provided himself with a blunderbuss and pistols for his defence against the press-gang,) called out and asked them what they came for: he was answered by some of the press-gang, "We come for you and your comrades." Whereupon he cried out, "Keep back, I have a blunderbuss loaded with 'swan-shot.'" Upon this the others stopped, but did not retire. He then cried out, "Where is your lieutenant?" And being answered, "He is not far off," he immediately fired among them. By this shot *Calaban* was killed on the spot, and one or two more of the press-gang wounded.

The case being thus, the recorder was of opinion, that the boat's crew having been sent out with a general order to impress as they should see opportunity, and having, in pursuance of that order, boarded the vessel without a proper officer, expressly against the terms of the captain's warrant, every thing they did was to be looked upon as an attempt upon the liberty of the persons concerned, without any legal warrant: and he accordingly

Mr. Serjeant  
Foster.

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cordingly directed the jury to find *Broadfoot* guilty of manslaughter. But this being a case of great expectation, and uncommon pains having been taken to possess people with an opinion that pressing for the sea-service is a violation of *magna charta*, and a very high invasion of the liberty of the subject, the recorder thought proper to deliver his opinion touching the legality of pressing for the sea-service; provided the persons impressed are proper objects of the law, and those employed in that service come armed with a proper warrant for that purpose.

Captain *Hanway*'s warrant with the indorsement.

By the commissioners for executing the office of Lord High Admiral of *Great Britain and Ireland*, &c, and of all his Majesty's plantations, &c.

*IN* pursuance of his Majesty's order in council dated the 19th day of January 1742, we do hereby impower and direct you to impress or cause to be impressed so many seamen and seafaring men and persons whose occupations and callings are to work in vessels and boats upon rivers, as shall be necessary not only to complete the number of men allowed to his Majesty's ship under your command, but also to man such others of his Majesty's ships as may be in want of men; giving unto each man so impressed one shilling for press-money. And in the execution hereof you are to take care that neither yourself nor any officer authorized by you do demand or receive any money, gratuity, reward, or other consideration whatsoever, for the sparing, exchanging, or discharging any person or persons impressed, or to be impressed, as you will answer it at your peril. You are not to intrust any person with the execution of this warrant but a commission-officer, and to insert his name and office in the deputation on the other side hereof, and set your hand and seal thereto. This warrant to continue in force till the 31st day of December 1743. And in the due execution of the same and every part thereof, all mayors, sheriffs, justices of the peace, bailiffs, constables, headboroughs, and all other his Majesty's officers and subjects whom it may concern, are hereby required to be aiding and assisting unto you and those employed by you, as they  
tender

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*tender his Majesty's service, and will answer the contrary at their perils. Given under our hands and seal of the office of Admiralty the 31st day of January 1742.*

By command of their  
Lordships.  
Thomas Corbett.

Jo. Cockburne,  
Geo. Lee.  
J. Trevor.

*I do hereby depute A. B. a lieutenant belonging to his Majesty's ship the Mortar Sloop under my command, to impress seamen, sea-faring men, and persons whose occupations and callings are to work in vessels and boats upon rivers according to the tenor of this warrant. In testimony whereof I have hereunto set my hand and seal this ——— day of ———*

### The RECORDER's Argument.

This question touching the legality of pressing mariners for the publick service is a point of very great and national importance. On one hand, a very useful body of men seem to be put under hardships inconsistent with the temper and genius of a free government. On the other, the necessity of the case seemeth to intitle the publick to the service of this body of men, whenever the safety of the whole calleth for it.

Before I speak directly to the point, it will be necessary to throw out of the case every thing which doth not enter into the merits of the present question.

We are not at present concerned to inquire, Whether persons may be legally pressed into the land-service, nor whether landmen may be legally pressed into the sea-service. The present question, I say, is not, Whether people may be taken from their lawful occupations at home, and sent against their wills into a remote and dangerous service; into a service they are utterly unacquainted with, and possibly unfit for. No, the only question at present is, Whether mariners, persons who have freely chosen a sea-faring life, persons whose education and employment have fitted them for the service, and inured them to it,—Whether such persons may not be legally pressed into

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into the service of the Crown, whenever the publick safety requireth it, *ne quid detrimenti respublica capiat*.

For my part I think they may. I think the Crown hath a right to command the service of these people, whenever the publick safety calleth for it. The same right that it hath to require the personal service\* of every man able to bear arms in case of a sudden invasion or formidable insurrection. The right in both cases is founded on one and the same principle, the necessity of the case in order to the preservation of the whole.

It would be time very ill spent to go about to prove, that this nation can never be long in a state of safety, our coast defended and our trade protected, without a naval force equal to all the emergencies which may happen. And how can we be secure of such a force? The keeping up the same naval force in time of peace, which will be absolutely necessary for our security in time of war, would be an absurd, a fruitless, and a ruinous expence.

The only course then left is for the Crown to employ upon emergent occasions the mariners bred up in the merchants' service.

By this means the trade of the nation becometh a nursery for her navy; and the merchant, while he is increasing the wealth of the kingdom, is at the same time training up the mariner for it's defence.

And as for the mariner himself, he when taken into the service of the Crown only changeth masters for a time: his service and employment continue the very same, with this advantage, that the dangers of the sea and enemy are not so great in the service of the Crown, as in that of the merchant.

I am very sensible of the hardship the sailor suffereth from an impress in some particular cases, especially if pressed homeward-bound after a long voyage. But the merchants who hear me know, that an impress on outward-bound vessels would be attended with much greater inconveniencies to the trade of the kingdom; and yet that too is sometimes necessary. But where two evils present, a wise admini-

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\* This personal service in cases of extreme necessity is a principal branch of the allegiance every subject of *England* oweth to the Crown. See 11 *H. VII.* c. 1. 1 *E. III.* c. 5. and 16 & 17 *Car. I.* c. 28.

stration,

stration, if there be room for an option, will choose the least.

War itself is a great evil, but it is chosen to avoid a greater. The practice of pressing is one of the mischiefs war bringeth with it. But it is a maxim in law, and good policy too, that all private mischiefs must be borne with patience for preventing a national calamity. And as no greater calamity can befall us than to be weak and defenceless at sea in a time of war, so I do not know that the wisdom of the nation hath hitherto found out any method of manning our navy, less inconvenient than pressing, and, at the same time, equally sure and effectual.

The expedient of a voluntary register, which was attempted in King *William's* time, had no effect.

And some late schemes I have seen appear to me more inconvenient to the mariner and more inconsistent with the principles of liberty, than the practice of pressing : and, what is still worse, they are in my opinion totally impracticable.

Thus much I thought proper to say upon the foot of reason and publick utility, before I come to speak directly to the point of law. Which I shall now do.

According to my present apprehension, (and I have taken some pains to inform myself,) the right of impressing mariners for the publick service is a prerogative inherent in the Crown, *grounded upon common-law, and recognized by many acts of Parliament.*

A general immemorial usage not inconsistent with any statute, especially if it be the result of evident necessity and withal tendeth to the publick safety, is, I apprehend, part of the common-law of *England*. If not, I am at a loss to know what is meant by common-law, in contradistinction to statute-law. And therefore it is a great mistake in this case, as indeed it would be in any other, to conclude that there is no law, because perhaps there may be no statute that expressly and in terms empowereth the Crown to press. For the rights of the Crown, and the liberties of the subject too, stand principally upon the foot of common-law; though both have been in many cases confirmed, explained, or ascertained by particular statutes.

As

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As to the point of usage in the matter of pressing, I have met with a multitude of commissions and mandatory writs to that purpose conceived in various forms; and from time to time directed to different officers, as the nature of the service required.

It would be tedious for me to cite one half of them; but I will endeavour to range them under some general heads, and then cite a few.

Some are for pressing ships.

Others for pressing mariners.

And others for pressing ships and mariners.

In some, the parties to whom they are directed are required to make a general impress upon certain great and emergent occasions.

In others they are confined to a certain number of ships and mariners for special services.

And in others, they are still farther confined to certain places on the coast.

Some commissions, particularly those conferring the admiralty-jurisdiction and the rights of admiralty, warrant an impress as often as there shall be occasion.

Others empower commanders of fleets or squadrons, intended for certain expeditions, to press for that particular service.

And others empower masters of particular ships to press for manning their respective vessels.

This general view will be sufficient to let us into the nature of these precedents. And though the affair of pressing ships is not now before me, yet I could not well avoid mentioning it; because many of the precedents I have met with and must cite go as well to that, as to the business of pressing mariners; and taken together, they serve to shew the power the Crown hath constantly exercised over the whole naval force of the kingdom, as well shipping as mariners, whenever the publick service required it.

This however must be observed, that no man served the Crown in either case at his own expence. Masters and mariners received full wages, and owners were constantly paid a full freight. But whether the pay in either case commenced



commenced from the time of pressing, or from the time of actual entry into the service, is not so clear.

There is in *Cotton's* \* records a note of a petition of the Commons, and of the King's answer upon this subject, in the 47 E. III; which inclineth me to think, that the latter was the case. The petition, as abridged by *Cotton*, is thus; "That  
" masters of ships may be paid the wages of them and their  
" mariners from the day of their being appointed to serve the  
" King." The answer is, "That taking of ships shall not be  
" but for necessity, and payment shall be reasonable as *heretofore*."

Cott. 118.  
No. 28.  
Rot. Parl.  
47 E. III. No. 28.

In the same Parliament an attempt was made to obtain for owners of ships an allowance for wear and tear in the King's service.

The petition is thus abridged, "The masters of ships require an allowance for the tackling of their ships worn by the King's service."

Eod. Rot.  
No. 29. Cott.  
118. No. 29.

The answer is, "Such allowance hath not been heretofore made."

In the 2 R. II. an attempt of the like kind was made and with the like success. The petition is, "That owners of ships taken up for the King's service, for their losses in the same, may be considered; and that mariners may have the like wages, as archers have." The answer is, "*It shall be as it hath been used.*"

Cott. 172.  
No. 50. Rot.  
Parl. 2 R. II.  
Pars secunda.  
No. 50.

These petitions, though filed in the record the petitions of the Commons, as having probably begun in that House, were really the acts of both Houses; otherwise they could not have been offered to the King in a parliamentary way: for the ancient method of passing bills was, that the matter of the bill was tendered to the Crown for the royal assent by both Houses in form of petitions; and according to the answers from the throne, they passed into laws or were rejected.

I cannot but observe, that when we see every branch of the legislature speaking of the subject of pressing in the manner they do in these petitions and answers, it is not easy to conceive, that the legality of the practice was then questioned. It is plain at least, that it was in those early

\* The citations from *Cotton* have been found to agree with the record.

times treated in Parliament as an antient and well-known usage.

I come now to the commissions and mandatory writs I spake of. I will cite a few from *Rymer's Fœdera*, out of a great number of the like kind which may be met with in that valuable collection of public records.

29 E. III.  
(5 Rym. 815.)  
Ad Eligendum  
& Capiendum.

*William Barret*, commander of the ship *Julian*, had a commission to make choice of and take up in the counties of *Kent, Essex, Surry, and Suffex*, as well within liberties as without, 36 mariners, and to put them on board his ship, in order to proceed with the Prince of *Wales* on an expedition to *Gascony* \*.

(5 Rym. 816.)

The like commissions were given at the same time to the commanders of seven other ships for manning their respective vessels for the same service.

1 R. II.  
(7 Rym. 196.)  
Ad Arrestandum  
& Capiendum.

There is a commission to *John Orewell*, one of the King's serjeants at arms, to arrest and take up 60 able mariners in the *Thames* and *Medway* and parts adjacent, as well within liberties as without, and to cause them to be at *Sandwich* within 15 days for the King's service.

15 R. II.  
(7 Rym. 718.)

*John Elingham*, a serjeant at arms, is impowered to arrest and take up in the counties of *Somerset, Gloucester, Bristol, Devon* and *Cornwal*, and in *South Wales*, as well within liberties as without, so many ships, barges, and other vessels, and also mariners sufficient for manning them, as should be found sufficient for an expedition to *Ireland* under the King's uncle the Duke of *Gloucester*: and all sheriffs, mayors, bailiffs, masters of ships and mariners are required to be assisting to him in that service.

(See also 7 Rym.  
195, 391, 453,  
501, 504, 606,  
507, 789, 839.)

(7 Rym. 718.)

In the same year the like commissions issued to two other serjeants at arms for the same service, in *Wales, Ireland, Lancashire, and Cheshire* †.

3 H. V.  
(9 Rym. 238.)

*John Kingston*, commander of the ship *Katherine*, is commissioned by himself or deputies to arrest and take up, as well within liberties as without, as many mariners as should be necessary for manning his ship, and to put them on board for the King's service: and all sheriffs, mayors &c. are required to be assisting to him in that service.

(See also 9 Rym.  
91, 104, 144,  
310.)

\* See *Madox's Hist.* of the Exchequer 262. in *Notis*, 9, a writ to the sheriff of *Kent* for the like service; *Eligi facias 50 nautas* &c. 9 E. II.

† (See the editor's note at the end of this argument).

Commissions went at the same time to six commanders of other vessels, for manning their respective vessels in the same manner, and for the same service. (9 Rym. 239.)

A mandatory writ issued directed to *Thomas College* Serjeant at Arms, and to *Ralph Ingoldesby*, and to the customers of the port of *Sandwich*, and of every port from thence to *Southampton*, requiring them to arrest and take up for the King's service all and singular ships, barges, and other vessels capable of transporting men or horses, of what burden soever; and also all masters and mariners who could be found in any of the ports mentioned before, and to put the said masters and mariners on board the said vessels for an expedition to the Dutchy of *Aquitain*; any royal letters of licence theretofore granted to any person or persons, or any other matter notwithstanding: and all sheriffs, mayors, and other officers are required to be assisting to them in that service. (21 H. VI. (11 R.) m. 21.) (See also 10 Rym. 449, 685.)

At the same time the like writs issued to the customers and other officers of almost all the port-towns in the kingdom. (11 Rym. 22.)

There is a commission to the master and purser of the *Mary Grace* empowering them to arrest and take up, as well within liberties as without, wheresoever they could be found, as many mariners as should be sufficient for manning their vessel, and to put them on board at the King's wages and for his service. (14 E. IV. (41 Rym. 843.) (See also 11 Rym. 839.)

At the same time the like commissions issued to four other masters for manning their respective ships in the same manner, (11 Rym. 843.)

The like commissions to masters of six vessels.

15 E. IV.

The like to eleven masters in the same form,

(12 Rym. 4, 5.)

20 E. IV.

(12 Rym. 139, 140.)

I will now mention a few precedents of another sort; which, because they relate in great measure to one and same service, I will place together, to avoid as much as possible a needless repetition in matters of form.

These are either special commissions for commanding fleets or squadrons intended for certain expeditions mentioned in the commissions; or the general commissions conferring the whole admiralty-jurisdiction with the rights of admiralty, whether to one person under the title of High Admiral or to two under the character of Admirals of the north and west. Which

latter was the usual manner of conferring the admiralty-jurisdiction before the office of Lord High Admiral of *England* came much in use.

8 H. V.  
(10 Rym. 58.)

Eligendi & Capendi.

As to the special commissions, Sir *William Bardolph* was appointed admiral of a fleet then intended to be fitted out; his commission empowereth him among other things to make choice of and take up for the King's service a sufficient number of mariners and others, and to put them on board the fleet, and to punish and chastise such mariners who should be disobedient or refractory *in that respect*.

5 H. VII.  
(12 Rym. 455.)

The Lord *Willoughby de Broke* was appointed commander in chief of the fleet and army then intended for an expedition to *France*; he hath the same powers with regard to the manning the fleet as Sir *William Bardolph* had.

8 H. VII.  
(12 Rym. 484.)

Sir *Robert Poyntz* is appointed to command the fleet in the absence of the Lord *Willoughby*, and hath the same powers with regard to manning the fleet.

37 Eliz.  
(16 Rym. 22.)

Sir *Martin Frobisher* had a commission, which, after reciting that the command of a small squadron intended against the *Spaniards* in the *West Indies* had been given to him, goeth on thus, "We therefore let you to wit that we have authorized and appointed, and by these presents do give full power and authority unto the said Sir *Martin Frobisher*, and to his sufficient deputy or deputies, wheresoever he shall have need, to press and to take up for our service, to the furniture of such ships as are committed to his charge, in any place upon our coasts of *England* or *Ireland*, any mariners, soldiers, gunners, or other needful artificers:" and then requireth all justices and other officers to be assisting to him in the premises.

I would not be understood to say, that all commanders of fleets or squadrons for special services have had the same powers as those I have mentioned. The truth is, the greater number of these special commissions, which I have met with, and those too of the latest date, are silent as to that point.

I come

I come now to the general commissions conferring the whole admiralty-jurisdiction and the rights of admiralty.

And those I have met with, though I apprehend they all agree in substance with regard to the present question, yet differ a little in point of form.

In the 10th E. III. and in the 12th of the same reign, the admirals (for at that time there were two, one for the north, the other for the west) are impowered to make choice of, as well within liberties as without, able-bodied men fit for the service, and to put them on board the fleet. The word *Eligendi*, made use of in these commissions, is the word used to the same purpose about that time in all the commissions for pressing for the land-service, which was then likewise practised. You have the word in relation to the land-service in the statute of the 18 E. III. Stat. 2. c. 7. "Men of arms, hoblors and archers, *chosen* to go in the King's service out of *England*, shall be at the King's wages from the day that they depart out of the counties where they were *chosen* till their return."

10 E. III.  
(4 Rym. 727.)  
12 E. III.  
(5 Rym. 3—6,  
83, 84.)  
*Eligendi*.

In the 50th E. III. the admirals' commissions, with regard to this matter, run thus, *Necnon naves & naviculas guerrinas, quot necessariae, cujuscumque portagii fuerint, quotiens necesse fuerit, congregandi; & marinarios & alios pro navibus & naviculis illis necessarios eligendi, capiendi, & in eisdem ponendi; & hujusmodi marinarios qui rebelles vel contrariantes fuerint in hac parte, debite compescendi & castigandi; & omnia alia, quae ad officium admiralli pertinent IN HAC PARTE, faciendi & exercendi; prout de jure & secundum legem maritimam fuerit faciendum.*

50 E. III.  
(7 Rym. 127,  
128.)

And all sheriffs, mayors, bailiffs, ministers, owners of ships, masters and mariners are required to be aiding and assisting to them in the premises.

The Admirals' commissions run exactly in the same form.

1 R. II.  
(7 Rym. 171.)

So doth *Thomas of Lancaster's* commission of High Admiral.

6 H. IV.  
(8 Rym. 388.)

So doth the *Earl of Warwick's* commission of High Admiral.

49 H. VI.  
(11 Rym. 679.)

And so doth the *Duke of Richmond's*.

17 H. VIII.  
(14 Rym. 42.)

The Lord *Seymour's* commission of High Admiral expresseth the matter a little differently: the words are, *Ac ad nautas &*

1 E. VI.  
(15 Rym. 127,  
128.)

*marinarios et alios, pro omnibus & singulis navibus et naviculis conducendum & gubernandum necessarios, eligendum, capiendum & apprehendendum, atque eosdem in dictis navibus & naviculis ponendum & retinendum.*

15 Rym. 157  
—163.)

In the same year the Lord *Seymour* had another commission in fuller terms, with all the jurisdictions and rights of admiralty particularly enumerated and set forth at large: the words with regard to the present matter are, *Et insuper tam naves & naviculas guerrinas quam quascunque alias naves & naviculas seu vasa quæcumque, pro quibuscunque viaggiis et negotiis nostris vel expeditione eorundem; necnon navigeros sive pilotas, ac navium magistros, nautas, naucleros, vibrellatores sive bombardiatores et marinarios ac alias personas quascunque, pro navibus et naviculis seu vasis hujusmodi aptos & idoneos, de tempore in tempus quotiens necesse fuerit, ubique locorum infra regna & dominia nostra prædicta; tam infra libertates quam extra, congregandum, deligendum; retinendum, capiendum, arestandum, deputandum & assignandum absque interruptione seu impedimento per quemcumque alium in contrarium, fiendo; cum plenâ jurisdictione & potestate ad exequendum omnia alia & singula quæ in ea parte per magnum admirallum nostrum & præfectum generalem classis & marium, jure fieri debent, possint, vel solent.*

3 E. VI.  
(15 Rym. 194.)

The Earl of *Warwick* had a commission of High Admiral in the same form.

14 Jac. I.  
(17 Rym. 124.)

And so had the Duke of *Buckingham*\*.

And now, when I consider these precedents, not fetched from dark, remote, and unsettled times, but running uniformly through a course of many ages, all, as I conceive, speaking to the same purpose, though in different forms of expression; some for making choice of, others, and those the much greater number and of the latest date, for making choice of and taking up,

\* The Earl of *Northumberland*'s commission, in the time of King *Charles* the first, is silent with regard to these powers; and I am inclined to think they were not inserted in any commission in the latter part of that reign. But that matter is sufficiently accounted for towards the end of this argument.

The High Admirals since the restoration have had all the powers for pressing conferred upon them, in as full a manner as in any of the commissions I have cited; and nearly in the same terms as in Lord *Seymour*'s second commission. And during such commissions, whenever an impress hath been ordered, it hath been by warrants from the High Admiral. But when that office hath been put in commission the same service hath been constantly carried on by warrants from the admiralty-board, grounded on orders made from time to time by the King in council, as the exigency of affairs hath required.

or for arresting, pressing and taking up mariners, and putting them on board for the publick service:—when I consider these precedents with the practice down to the present time, I cannot conceive otherwise of the point in question, than that the Crown hath been always in possession of the prerogative of pressing mariners for the publick service. Which prerogative hath been carried into execution, as well by virtue of special commissions, issued as the exigency of affairs required, as by the persons who from time to time have been intrusted with the whole admiralty-jurisdiction.

And indeed the words, touching the manning the fleet, empowering the admirals to do and execute all other matters and things touching that service *which belong to the office of admiral*, seem to imply either that those powers were deemed to be inherent in the office, or that they had been constantly by express words in the commissions annexed to it.

To this purpose I will mention a very remarkable transaction in the Parliament of the 7th and 8th H. IV.

Complaint was made in Parliament, that the sea-service had been greatly neglected, and that depredations were daily committed. To remedy this evil a very extraordinary expedient was offered, to which the necessity of the King's affairs obliged him *for the present* to submit. It was, that the naval force of the kingdom should, for a time, be put under the direction of the merchants themselves.

Accordingly an act passed, that the merchants should have the keeping of the seas from the first day of *May* 1406 to *Michaelmas* 1407: and to defray the expence of this service they were to be intitled by writs of privy-seal to certain duties mentioned in the record, as I find it abridged by *Cotton*,

Cott. 452, 453.  
Rot. Parl. 8 H.  
IV. No. 19. to  
No. 26.

Among other provisions touching this matter, it was enacted, that the merchants should name two persons, one for the north and the other for the south, who by commission should *have the like powers as other Admirals have had*.

No. 26.

In pursuance of this act, *Nicholas Blackburn* was named by the merchants for the north, and *Richard Cliderow* for the south.

One might reasonably hope, that no powers deemed illegal or oppressive, no powers hurtful to trade or grievous to the mariners, should be inserted in the commissions of admirals nominated by the merchants: but it happeneth that *Blackburn's* commission is extant, and runneth in the very words of those I have cited from the 50th of *E. III.* to the 17th of *H. VIII.*

§ Rym. 439.

You have it in *Rymer*. It reciteth the act of Parliament, and that *Blackburn* had been nominated by the merchants for the north, and then goeth on in the usual form empowering him to make choice of, take up and put on board such mariners and others as shall be found necessary for the service, and to punish and chastise such as shall be disobedient and refractory in that behalf.

§ Rym. 455.  
(Cott. 462.)

The commission was to continue as long as the merchants should have the keeping of the seas; which indeed was not long; for before that Parliament rose, this novelty came to an end, the merchants were eased of a service they were found to be very unequal to, their admirals' commissions dropped, and the whole direction of the marine returned to its proper channel.

I think it may safely be inferred from this record, that in the judgment of those times, and in a concern of the merchants themselves, the practice of manning the navy by the methods mentioned in these commissions was esteemed to be necessary for the service and a branch of admiral jurisdiction\*.

I come now to the statutes which speak of this matter.

And I do admit, that I know of no statute now in force, which directly and in express terms empowereth the Crown to press mariners into the service: and admitting that the prerogative is grounded on immemorial usage, I know of no necessity for any such statute; for let it be remembered, that a prerogative grounded upon general immemorial usage

\* The Parliament Roll placeth this Parliament in the 8th of *H. IV.*, whereas *Rymer*, *Dugdale*, and the printed statutes place it in the 7th. It was, to speak in modern language, a Parliament of the 7th and 8th of that reign; it began in the 7th and ended in the 8th.



not inconsistent with any statute, nor repugnant to the publick utility, is as much part of the law of *England*, as statute-law, You will be pleased to carry this observation too along with you, that the statutes, which mention pressing as a practice then subsisting and not disallowed, are at least an evidence of the usage, if they go no farther, I mean if they do not amount to a tacit approbation of it.

For it is hard to conceive, that the legislature should frequently mention a practice utterly illegal, and repugnant to the principles of the constitution as subsisting, without some mark of disapprobation.

The first statute I have met with is that of the 2 R. II. <sup>2 R. II. c. 1,</sup> ft. 1. c. 4. It is an act against mariners deserting the service; not to be met with in the later editions of the Statutes at Large, which give us only the title of this act, with a note that it is altered by the 18th H. VI. and 5th Eliz.

It is however still in force, and as such is inserted by *Rassal* in his abridgment under title *Mariner* No. 1. My worthy friend Mr. *Cay* hath likewise inserted it in his abridgment under title *Seaman* No. 1. I will give you the words of the act as far as concerneth this point, as I find it in an edition of the Statutes at Large\* ending with the last year of H. VII. "Item because that divers mariners, after that they be arrested and retained for the King's service upon the sea in defence of the realm and thereof have received their wages, do flee out of the said service without licence of the admirals or their lieutenants—It is ordained and established, That all those mariners, which from henceforth shall do in such manner,—shall be holden to restore to our said Sovereign Lord the King the double of that they have taken for their wages, and nevertheless shall have one year's imprisonment without being delivered by mainprize, bail, or by other way."

The act then goeth on to direct how fugitive mariners shall be apprehended and dealt with; and concludeth with this clause, "And like punishment shall be made of serjeants of arms, masters of ships and all others that shall be attainted

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\* It is likewise in a collection of the Statutes at Large, called *Rassal's* Statutes, printed 1618, and in an old collection of the statutes called the *Great Book of Statutes*; and in every edition antecedent to *Pulton's* in 1618. (It is now printed in several of the modern editions of the Statutes.)

"before

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"before the admiral or his lieutenant aforesaid, that they have  
 "any thing taken of the said mariners for to suffer them to go  
 "at large out of the said service after that they have been  
 "arrested for the same service."

(7 Rym. 397,  
 453, 501, 504,  
 789, 839)

You will be pleased to observe, that the word *arrest*, twice used in this act, is made use of in the precedents I cited of the 1st and 15th of this very reign, and in most of those of later date: it is likewise used in ten other commissions in the same reign touching this very service, all likewise directed for execution to serjeants at arms, which for brevity-sake I have omitted.

So that if it be asked, who are the persons subjected to the penalties of this act? it must be answered, mariners arrested and taken into the service by virtue of commissions from the Crown, in case of their desertion; and serjeants at arms, masters of ships and others executing such commissions, who for lucre shall suffer them to go at large after such arrests.

Mariners indeed were not subject to the penalties of this act, unless they had received wages. But might not a mariner so arrested have reasonably said, I was compelled against law into the service, I did my duty while I continued in it, and dearly earned the wages I received; Might not a mariner have said this, and much more, upon a supposition of the illegality of an impress? Certainly he might. But you see mariners, though taken into the service by compulsion, are by this act made liable to pecuniary, and corporal punishment too, in case of desertion †. This doth *more than imply* the legality of such compulsion.

It may possibly be objected, that the word *retained* is used in the act, and that a retainer implieth a mutual contract for some service to be done. It may, when it standeth alone, have received that sense in modern language, but in strict propriety it meaneth nothing more than the taking a person into some service; and this is in truth the act only of the person retaining or taking: and therefore when I see the word *retained* con-

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† See *Statuta de Officio Admiralitatis Angliæ*, published by Dr. Simpson in the year 1743, at the end of *Clark's Praxis Supreme Curie Admiralitatis*—Articles 10, 37, 39; and the learned doctor's notes on those articles touching ships and mariners pressed into the King's service.

hected with one, which hath no other meaning in the *English* tongue than what carrieth with it the idea of compulsion, I cannot conceive that the legislature, speaking of persons *arrested* and *retained*, should mean no other than persons taken into the service with their own consent.

That there was a practice then subsisting of taking mariners into the service by compulsion cannot be denied: the Parliament could not be ignorant of it. Is it possible then to imagine, that they could use a word which manifestly signifieth compulsion, and yet mean nothing more than a mutual contract? Besides, it cannot be conceived, that serjeants at arms, who, as I before observed, were the persons about that time usually employed in the service of pressing, could be expressly and by name subjected to the penalties of the act, if no mariners but such as voluntarily entered into the service were comprehended in it.

The next act is that of the 2d & 3d Ph. and Mar. which layeth a penalty on watermen plying between *Gravesend* and *Windfor*, who, to speak in the language of the act, in the time of pressing by commission for the service of the Crown upon the sea, do willingly and *obstinately* withdraw, hide and convey themselves into secret places and out-corners; and after, when such time of pressing is over-passed, return to their employments.

This provision, it is true, extendeth only to watermen on the *Thames*, and may be considered as one of the many wholesome regulations those persons are brought under by this act: and it is mentioned in that light in an act passed in the late Queen's time. But at the same time it sheweth, that commissions for pressing were then in use: and, in my opinion, it likewise supposeth the legality and utility of such commissions, and that these people are the objects of them; otherwise why are they subjected even to the slightest punishment for absconding at the time of the execution of those commissions?

The acts which come next to be considered are some made since the revolution; a most auspicious period! when the principles of liberty were well understood, and most gloriously asserted.

These are the 7th & 8th of King *William*, the 2d & 3d, and the 4th & 5th of the late Queen.

7 & 8 W. III.  
c. 21.

The first is intitled, *An act for the increase and encouragement of seamen.*

Sect. 15.

It enacteth, among other things, that licences may be given, by his Majesty, or the Lord High Admiral, or Commissioners of Admiralty, to any landmen willing to enter into the merchants' service; which shall be to them a protection *against being impressed for the space of two years.*

Provided such landmen bring two credible persons to vouch for them. But if any person shall vouch for any one as a landman, who shall afterwards appear to have been a seaman, he shall forfeit twenty pounds.

2 & 3 A. c. 6.

The 2d & 3d of the late Queen is intitled, *An Act for the increase of seamen, and better encouragement of navigation and security of the coal-trade.* To these ends it empowereth parish-officers to bind out poor boys to sea in the merchants' service; and enacteth, that boys so bound out shall not be compelled or *impressed* or permitted to enter into the service of the Crown at sea till they attain their age of eighteen, and that certificates of such binding shall be transmitted by the collectors of the respective ports to the Admiralty; and that thereupon such protections shall be made for such apprentices without fee or reward.

Sect. 4, 5,

Sect. 15,

And, for encouraging other persons to bind themselves apprentices in the merchants' service, it farther enacteth, that persons so binding themselves shall not be *compelled or impressed* into the service of the Crown for *three years* from the time of such binding, and that, upon certificates of such binding from the collectors of the respective ports, the Admiralty shall grant protections without fee or reward.

Sect. 20.

And, for encouraging the coal-trade, it farther enacteth, that during the war there shall be allowed to every vessel employed in that trade, besides the master, mate, and carpenter, one able seaman for every one hundred tun of the vessel, not exceeding three hundred tun, *free from impressing.*

4, 5 Ann. c. 19.  
1. 17.

The 4th & 5th of the late Queen reciteth that clause in the act of the 2d & 3d, which exempted voluntary apprentices for three years, and saith, "Whereas such exemption for

"three years, which was intended for the encouragement of  
 "landmen to bind themselves, hath been *manifestly abused for*  
*"the exempting and protecting of seamen from the service, to the*  
*"great hindrance and prejudice of her Majesty's sea-service; be*  
 "it therefore enacted and declared, that no person or persons  
 "of the age of eighteen years shall have any exemption or  
 "protection from her Majesty's sea-service, who shall have  
 "been in any sea-service before the time they bound them-  
 "selves, any law or statute to the contrary notwithstanding." †

Let us now take a short view of these acts.

Persons under certain special qualifications are exempted from being impressed.

To that end, in one case, licences are to be granted by his Majesty or from the Admiralty, *but under proper cautions to prevent abuses.*

In other cases, certificates are to be returned from the chief officers of the ports, and protections thereupon granted without fee or reward.

And in every case these exemptions, as they are confined to persons under certain limited qualifications, so are they limited too in point of time, *and wishtal given by way of encouragement.* And lastly, the extending the benefit even of a temporary exemption beyond the original intent of the legislature is declared to be an abuse, and an abuse tending to the great hindrance and prejudice of her Majesty's sea-service.

Do not these things incontestably presuppose the expediency, the necessity, and the legality of an impress in general? If they do not, one must entertain an opinion of the legislature acting and speaking in this manner, which it will not be decent for me to mention in this place.

For the very notion of an exemption, when granted by statute to particular persons, and this too by way of encouragement, implieth, that, without such exemption, the parties intitled to the benefit of it would by law be liable to the duty or

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† *N. B.* Other acts to the like purpose which did not occur to the author when this argument was delivered are, 1 *Anne*, *sess.* 1. c. 16. *f.* 2. 6 *Anne*, c. 31. *f.* 2. 13 *Geo.* II. c. 17. *f.* 1, 2, 3. and c. 28. *f.* 5. (See also 19 *Geo.* II. c. 30.)

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burden which is the subject-matter of that exemption : otherwise the statute doth nothing, it operateth upon nothing, if no legal duty or burden be removed by it. And consequently the granting exemptions to seamen under certain limited qualifications, and for a limited time only, supposeth that all seamen in general, without such exemption, were by law liable to the duty or burden, which is the subject-matter of that exemption.

And the many provisions the legislature hath made to prevent abuses with regard to these exemptions, attended with a plain, full and express declaration, that such abuses, *namely the extending the benefit of exemptions beyond the intent of the legislature*, tend to the great hindrance and prejudice of the sea-service, imply, that the duty or burden, which is the object of all this care and caution, is expedient and necessary to the service.

And this burden is plainly an impress in time of war.

Which, from the authorities I have cited, appeareth to me to be grounded on common and statute law ; in other words, upon a general immemorial usage, allowed, approved, and recognized by many acts of Parliament.

Against what I have said it hath been objected, that the practice of pressing is inconsistent with the liberty of the subject, and a breach of *magna charta*.

I readily admit, that an impress is a restraint upon the natural liberty of those who are liable to it : but it must likewise be admitted on the other hand, that every restraint upon *natural* liberty is not *eo nomine* illegal, or at all inconsistent with the principles of *civil* liberty. And if the restraint, be it to what degree soever, appeareth to be necessary to the good and welfare of the whole, and to be warranted by statute-law, as well as immemorial usage, it cannot be complained of otherwise than as a private mischief : which, as I said at the beginning, must, under all governments whatsoever, be submitted to for avoiding a publick inconvenience.

As to *magna charta*, it is not pretended that the practice of pressing mariners for the publick service is condemned by express words in that statute : and if it be warranted by common

mon and statute law, it cannot be shewn to be illegal by any consequences drawn from *magna charta*; in like manner as pressing for the land-service could not be deemed illegal, or inconsistent with the principles of our constitution, while there were temporary acts (as there were many in the late war) to warrant it.

Besides, we know that *magna charta* hath been expressly and by name confirmed by many acts of Parliament, my Lord *Coke* saith 32; and yet the practice of pressing mariners still continued through all ages, and was never, that I know of, once mentioned in any of those acts as illegal or a violation of the great charter.

In a similar case, I mean the practice of pressing soldiers for foreign service, there are statutes of an early date, which, I conceive, were intended against it; though it was practised long afterwards. But those acts extend only to the case of pressing for the land-service, not a word do I find in them touching the sea-service. One reason of the difference, among others, may be that the land-service was thought to be sufficiently provided for in ordinary cases by the military tenures; and extraordinary cases, cases of necessity, such as that of a foreign invasion, were expressly excepted. In those cases, saith the 1 E. III, *it shall be done as in times past*; which, we know, was by commissions of array; whereas no competent provision was made by law for the ordinary sea-service. There were no naval services due to the Crown, except those of the cinque ports and a very few others; which, all together, were too inconsiderable to be mentioned, and bore no sort of proportion to the common exigencies of the publick in time of war.

But there is another objection, which deserveth to be considered. It is, that temporary acts have from time to time been made authorizing the pressing mariners for the sea-service; from whence it is argued, that the legislature, which is supposed to do nothing in vain, would not have given those powers for a time, if the King by his prerogative could have provided for the service without the aid of such temporary acts.

The

2 Vol. 679, in  
margine.

The gentleman who had the care of publishing Lord Chief-Justice *Hale's* History of the Pleas of the Crown referreth to several temporary acts made in the late Queen's time authorizing, as he supposeth, the pressing of soldiers and *mariners*. I have looked into all those acts. They are solely for pressing soldiers and *marines*: not a single word that concerneth the pressing of *mariners* do I find in any of them.

4, 5 Annæ,  
c. 19.

There was indeed an act made in that reign for compelling *mariners* into the service, by methods which, it was then thought, the prerogative alone could not warrant. To that end it authorized and required justices of the peace, and other magistrates, to cause privy searches to be made from time to time for *mariners*, who, as the act expresseth it, *did lie hid, withdraw, and conceal themselves*, and to deliver them when apprehended to conductors for the service of the Crown: and constables and other officers were, by warrants from the magistrates, to make privy searches by night, and were impowered to enter houses and open doors in execution of such warrants, and were required to give an account of their proceedings from time to time to the magistrates on oath, and, in case of negligence or remissness in the premises, were subjected to pecuniary punishments. This is the substance of the first nine sections of the act; which sections, continuing in force only till the first of *March* 1706, are not printed in the later editions of the statutes at large.

But it cannot, I conceive, be inferred from the new powers given by this act, that an impress by commission from the Crown or by Admiralty-warrants, which was practised at that very time, was illegal. All that can be inferred is, that the ordinary methods then in use were found ineffectual; and therefore the legislature had, for that time, recourse to an extraordinary one, for compelling into the service those, who could not be come at by the ordinary methods; those, who, in the language of the act, *lay hid, withdrew, and concealed themselves*. And to that end, civil magistrates and civil officers are required and authorized to do, what, in the judgment of the legislature, without the aid of that act, they could not have done, or at least were not compellable to do.

And



And whoever readeth and considereth the 17th and 18th sections of this act, which I have already cited to another purpose, will hardly conceive, that that Parliament had any doubts concerning the legality of an impress by the ordinary methods of law.

Indeed the temporary acts of the 16th and 17th *Car. I.* come directly to the point. They authorized an impress by admiralty-warrants for a limited time: and had temporary acts of that kind been frequent, or had the practice of pressing been discontinued from the time of *Charles* the first, unless when revived by subsequent temporary acts, I think what hath been said upon the foot of antient precedents could, after all, have had very little weight; for I freely declare, that antient precedents alone, unless supported by modern practice, weigh very little with me in questions of this nature; I mean, in questions touching the prerogative. But we all know, that the practice of pressing by admiralty-warrants hath continued, now near a century since the expiration of those acts of King *Charles* the first, without one statute of the like kind to authorize it.

16 & 17 *Car. I.*  
c. 5. 23. 26.

These acts of King *Charles* the first do indeed shew, that the prerogative of pressing mariners into the publick service was at that time *doubted of*: and whoever considereth the peculiar circumstances of that time, when the prerogative had in too many instances been carried to great lengths, and when the nation was at the very eve of a civil war upon the subject of liberty and prerogative, and considereth withal that a naval force must in all events, as things then stood, be provided;—whoever, I say, considereth these things, will not wonder, that the prerogative of pressing mariners should, at that very critical time, be called in question; or that, in order to procure an universal submission to a measure *necessary at that time*, the authority of Parliament should be called in, in aid of the prerogative.

There was a temporary act made in this very session for pressing for the land-service. It reciteth that a rebellion was on foot in *Ireland*, and then declareth, almost in the words of *1 E. III.* before cited, *That by law no man is compellable to go out of his county to serve as a soldier, except in case of necessity of*  
M *sudden*

*sudden coming of strange enemies into the kingdom, or except he was bound thereto by tenure.*

It is worth observing, that no such declaration saving the rights of the subject is to be found in any of the acts of this session for pressing mariners: and the different penning of these acts, made in the same session, and touching cases of so similar a nature, strongly intimateth, that the point was not, even at that critical time, thought equally clear in the one case as in the other. The same observation occurreth with regard to the different penning of all the acts of the late queen for pressing soldiers and marines, and of that for pressing mariners; the former declare, that it was necessary at that time of war that soldiers and marines should be raised by the methods prescribed in the acts, "By common consent and grant in Parliament." These are the words of the acts, and they are the very words made use of to the same purpose in the 25th E. III. already cited. The latter, without any such declaration, barely empowereth and requireth magistrates and other peace-officers to make search for and apprehend mariners, who then lay hid, withdrew and concealed themselves, and to send them into the service.

1 Vol. 678.

The chapters  
are misnum-  
bered, they are  
5, 23, 26.

Lord Chief-Justice *Hale*, in his history of the pleas of the Crown, speaking of the legality of pressing, which he indeed seemeth to doubt of, saith, "He that looks upon the acts enabling pressing of soldiers and mariners for foreign service upon or beyond the sea, namely 17 Car. I. c. 12, 25, 26. may think that those times made some doubt of it. But of this," saith he, "I deliver no opinion."

That learned man, you see, carrieth the inference from these temporary acts no farther than to render the matter doubtful; and so he leaveth it. But had he lived to see the practice of pressing mariners continue near a century longer, and especially had he seen this practice treated by the legislature in the manner the acts made since the revolution treat it, I think what was then but matter of doubt would have now appeared to him in a different light. I confess it doth so to me: for rights of every kind, which stand upon the foot of usage, gradually receive new strength in point of light  
and

and evidence from the continuance of that usage; as it implieth the tacit consent and approbation of every successive age, in which the usage hath prevailed. But when the prerogative hath not only this tacit approbation of all ages, the present as well as the former on it's side, but is recognized, or evidently presupposed, by many acts of Parliament, as in the present case I think it is, I see no legal objection that can be made to it.

I make no apology for the length of my argument, because I hope the importance of the question will be thought a sufficient excuse for me in that respect: for it is no more nor less than, Whether the only effectual method yet found out for manning our navy in time of war, for raising that number of mariners *which the legislature from time to time declare to be necessary* for defending our coast and protecting our trade,—whether this method be legal or not. This, I say, is the question: and therefore I could not satisfy myself without entering as far into the merits of it as I could.

And I have delivered my opinion upon it without any reserve.

(*N. B.* The authorities for pressing mariners for the publick service, to be found in *Rymer's Fœdera*, are so numerous, that the learned author purposely left many of them uncited by him. To some of these in the reigns of *Richard II*, *Henry V*, *Henry VI* and *Edward IV* I have referred in the margin of his argument. But as amongst the commissions and mandatory writs cited in pages 162 and 163 he hath given none which were issued in the reign of *Henry IV*, I think it not improper to take particular notice in this place of two commissions granted in that King's reign. The first of them was issued in the 12th year of his reign; and being a remarkably strong authority for the practice, it deserves to be here transcribed. It is in the following form.

M 2

*Rex*

## THE REPORT.

Rym. 700.

*Rex dilecto sibi Roberto Spellowe servienti suo ad arma, Salutem.*

*Scias quod assignavimus te, tam ad omnes et singulas naves, bargeas, et balingeras, ac alia vasa portagii triginta doliolum et ultra, in quibuscumque portubus et locis regni nostri Angliæ inveniri poterunt, quam ad tot magistros et marinarios, quot pro gubernatione navium, bargearum, balingerarum et vasorum prædictorum necessarii fuerint, infra libertates et extra, pro denariis nostris prompte et rationabiliter solvendis, arestandum et capiendum, et usque portum civitatis nostræ Londoniæ,*

*Ad proficiscendum nobiscum in propria persona nostra in præsentī viagio nostro versus partes transmarinas,*

*Duci faciendum,*

*Et ad omnes illos quos in hac parte contrarios inveneris seu rebelles arestandum et capiendum, et prisonis nostris mancipandum, in eisdem moraturos quousque pro eorum deliberatione aliter duxerimus ordinandum;*

*Et ideo tibi præcipimus quod circa præmissa diligenter intendas, ac ea facias et exequaris in forma prædicta :*

*Damus autem universis et singulis vicecomitibus, majoribus, ballivis, constabulariis, ministris, possessoribus, magistris et marinariis navium, bargearum, et balingerarum, et aliorum vasorum quorumcumque, ac aliis fidelibus et subditis nostris, tam infra libertates quam extra, tenore præsentium, firmiter in mandatis, quod tibi in executione præmissorum pareant, obediant, et intendant, prout decet.*

*In cujus &c.*

*Teste Rege apud Westminsterium Tertiæ die Septembris.*

*Per ipsum regem.*

Rym. 730.

By the other, which issued in the 13th year of the same reign, *John Drax*, a serjeant at arms, is impowered, by himself and his deputies, to arrest and take up one hundred mariners in the county of *Suffolk*, one hundred in the county of *Kent*, and thirty in the county of *Essex*. And all sheriffs, mayors and other officers are required to be assisting to him in that service.)

END OF THE REPORT.

**D I S C O U R S E I.**

**O F**

**H I G H T R E A S O N.**

**M 3**



# INTRODUCTION

## TO THE DISCOURSE ON HIGH TREASON.

**H**IGH Treason being an offence committed against the duty of allegiance, it may be proper, before I proceed to the several species of that offence which will be the subject of this discourse, to consider from whom, and to whom allegiance is due.

SECT. I. With regard to natural-born subjects there can be no doubt. They owe allegiance to the Crown at all times and in all places. This is what we call *natural allegiance*, in contradistinction to that which is local. The duty of allegiance, whether natural or local, is founded in the relation the person standeth in to the Crown, and in the privileges he deriveth from that relation. Local allegiance is founded in the protection a foreigner enjoyeth for his person, his family or effects, during his residence here; and it ceaseth whenever he withdraweth with his family and effects. Natural allegiance is founded in the relation every man standeth in to the crown, considered as the head of that society whereof he is *born a member*; and on the peculiar privileges he deriveth from that relation, which are, with great propriety, called his *birthright*. This birthright nothing but his own demerit can deprive him of; it is indefeasible and perpetual: and consequently the duty of allegiance, which ariseth out of it, and is inseparably connected with it, is in consideration of law likewise unalienable and perpetual.

Sect. 1.  
Natural allegiance.

The merits of Dr. Storey's case, in point of substantial justice, turned singly upon the doctrine of natural allegiance; and in a very modern case\* this doctrine was treated by the court as a point never yet disputed. How far prudential considerations, grounded on reasons of state, or *even the principles of natural equity*, may under certain circumstances in-

Dy. 298. pl. 29.  
300. pl. 38.  
Camd. Ao.  
14 Eliz.

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\* *Aneas M'Donald's case* on the special commission in *Surry* 1746, reported before, p. 59.

duce the Crown to dispense with a rigorous execution of a law, extremely right and expedient considered as a general rule, falleth not within the compass of my present inquiry.

The doctrine of allegiance founded in birth may, as I have said, be considered as a good general rule, though not universally true. Cases may be put which will be considered as exceptions to it, which I will not enter into at this time. Whenever they come in judgment, due regard will certainly be paid to them.

And whenever, in the case of individuals, the general rule shall be found to border on the *summum jus*, the benignity of our law hath provided a proper resource in the equity of the Crown. I say the equity of the Crown; for mercy to individuals, when properly conducted, is founded in natural equity, and in the principles of our constitution\*. It is nothing more than weighing the merits of each case, all circumstances considered, in the scale of wisdom and sound policy, against the rigour of the law.

Mr. *McDonald*, whose case I have just mentioned, was pardoned upon very equitable and easy terms.

There have been writers, who have carried the notion of natural, perpetual, unalienable allegiance much farther than the subject of this discourse will lead me. They say, very truly, that it is due to the person of the King; and from thence have drawn consequences, which do not fall within the compass of the present inquiry, and shall therefore be passed over. It is undoubtedly due to the person of the King; but in that respect natural allegiance differeth nothing from that we call local. For allegiance considered in every light is alike due to the person of the King; and is paid, and, in the nature of things, must constantly be paid, to that Prince, who, for the time being, is in the actual and full possession of the regal dignity. The well-known maxim, which the writers upon our law have adopted and applied to this case, *nemo potest exuere patriam*, comprehendeth the whole doctrine of natural allegiance, and expresseth my sense of it.

(1 Hale 68, 96.  
1 Inst. 129. 2.)

1 W. & M. Sess.  
1702.

\* See the coronation oath, "Will you to your power cause law and justice, in mercy to be executed in all your judgments?"



## OF HIGH TREASON.

**SECT. 2.** An alien, whose Sovereign is in amity with the Crown of *England*, residing here and receiving the protection of the law, oweth a local allegiance to the Crown, during the time of his residence: and if, during that time, he committeth an offence, which in the case of a natural-born subject would amount to treason, he may be dealt with as a traitor. For his person and personal estate are as much under the protection of the law as the natural-born subject's: and if he is injured in either, he hath the same remedy at law for such injury.

**Sect. 2.**  
An alien *amity*.  
(1 Hale 59, 92.)

**SECT. 3.** An alien, whose Sovereign is at enmity with us, living here under the King's protection, and committing offences amounting to treason, may likewise be dealt with as a traitor. For he oweth a temporary local allegiance, founded on that share of protection he receiveth \*.

**Sect. 3.**  
An alien *enmity*.  
(1 Hale 60, 92.)

**SECT. 4.** And if such alien, seeking the protection of the Crown, and having a family and effects here, should, during a war with his native country, go thither, and there adhere to the King's enemies *for purposes of hostility*, he might be dealt with as a traitor. For he came and settled here under the protection of the Crown; and, though his person was removed for a time, his effects and family continued still under the same protection. This rule was laid down by all the judges assembled at the Queen's command Jan. 12th 1707.

**Sect. 4.**  
Such alien having a family here, and adhering to the king's enemies in his own country.

**MSS. Tracy,**  
Price, Dod and Denton.

It is to be observed, that the judges, in the resolution last cited, laid a considerable stress on the Queen's declaration of war against *France* and *Spain*; whereby she took into her protection the persons and estates of the subjects of those Crowns residing here and demeaning themselves dutifully, and not corresponding with the enemy. King *William* and Queen *Mary*, did the same in their declaration of war against *France*, and so did his present Majesty. These declarations did in fact put *Frenchmen* residing here and demeaning themselves dutifully, even in time of war, upon the foot of aliens com-

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\* See 9 A. c. 16. the judgment of Parliament touching the case of the Marquis de *Guiscard* residing here, during the war, and holding a traitorous correspondence with *France*.

ing hither by licence or safe-conduct. They enabled them to acquire personal chattels and to maintain actions for the recovery of their personal rights, in as full a manner as aliens *any* may\*.

But, as I said before, all aliens *enemy* residing here under the protection of the Crown, though possibly not favoured as the persons last mentioned, yet they, in case they commit crimes which in a subject would amount to treason, may be dealt with as traitors. For their *persons* are under the protection of the law; and in consequence of that protection, they owe a local temporary allegiance to the Crown.

Sect. 5.  
Indictment  
against an alien.

4 St. Tri. 687,  
689.  
Cranburn's  
case.  
Salk. 633.

SECT. 5. In the case of treason committed by an alien, the indictment must charge, that it was done *contra ligeantiae suae debitum*, leaving out all the words which import a *natural* allegiance. These words are generally used in the cases of natural-born subjects, but they are not absolutely necessary even in those cases. They may be omitted, and many precedents there are where they have been omitted; for every species of allegiance is comprized under the general word *allegiance*: and therefore, in my opinion, the safer way is to omit them in all cases, were it but to keep clear of the difficulties mentioned in the next section.

Sect. 6.  
An insufficient  
indictment  
against an alien.

SECT. 6. It was said by the court in the case of *Cranburn* cited in the last section, that if an alien be indicted for high treason *contra NATURALEM dominum*, or *contra NATURALIS ligeantiae suae debitum*, the defendant may give *alienage* in evidence; and if that appeareth he shall be acquitted; because the indictment chargeth a breach of that species of allegiance which is not due from an alien. But it ought to be observed, that that point was not then in judgment before the court, nor could be, for *Cranburn* was a natural-born subject; and that when it did come directly under consideration, as it did many years afterwards in the case of Mr.

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\* See the case of *Wells and Williams*, (Mich. 9 W. III.) Salk. 46. *Lutw.* 34. *Ld. Raym.* 282. and *Pafch.* 11 *Anhe*, a like case in *Trover* by the administrator of *Guiscard* mentioned in the marginal note on section 3. (See also *Sylvester's* case *Hil. 1 Ann. Far.* 150.)

*Francia* a *Frenchman* born at *Bordeaux* and never naturalized, the court did not go so far as to direct the jury to acquit him in case they were satisfied with his birth within the dominions of the *French King*, but told them, that, if they thought him guilty of the charge in the indictment, they should find him so, and withal find that he was an alien born in the dominions of the *French King*. This, I presume, was done in order that the point might be farther weighed and considered on a special verdict; but the jury acquitted him of the whole charge, and so the point never came in judgment: and I do not find, that it ever was judicially determined, though there are many *dicta* in the books, which favour the opinion delivered in *Cranburn's* case. I think that opinion is good law, for the reason before given.

6 St. Tri. 87,  
88.

(1 Hale 59, 92.)

SECT. 7. The case of an ambassador, or his attendants, not being subjects of *Great Britain*, mentioned by Lord *Hale*, doing acts which in a subject would amount to high treason, will, as his Lordship observeth, be always governed rather by prudential considerations, or what are generally called *reasons of state*, than by any fixed rules of law: and as ambassadors generally act under direction and by orders from their Sovereigns, they have seldom been proceeded against farther than by imprisonment, seizing their papers and sending them home in custody. Which was done in the case of Count *Gyllenborg* the *Swedish* minister in the late King's time.

Seft. 7.  
Ambassadors.  
1 Hale 95—  
100.

But whatever proceedings be against them for state-crimes, they are to be considered at the worst but as enemies subject to the law of nations; never as traitors subject to our municipal laws, and owing allegiance to the Crown of *Great Britain*; unless perhaps in case of attempts directly and immediately against the life of the King; in which case no orders from their Sovereigns can be presumed, or, if in fact produced, would justify or excuse: and therefore I shall not take their case into consideration in this place. And for the same reason I say nothing of the case of spies taken here in time of war, *actual hostilities*

*hostilities being on foot in the kingdom at that time, nor of prisoners of war.*

But for murder and other offences of great enormity, which are against the light of nature and the fundamental laws of all society, the persons mentioned in this section are certainly liable to answer in the ordinary course of justice, as other persons offending in the like manner are: for though they may be thought not to owe allegiance to the Sovereign, and so to be incapable of committing high treason, yet they are to be considered as members of society; and consequently bound by that eternal universal law by which all civil societies are united and kept together †.

SECT. 8.  
Allegiance due  
to kings *de facto*  
only.

SECT. 8. Protection and allegiance are reciprocal obligations, and consequently the allegiance due to the Crown must, as I said before, be paid to him, who is in the full and actual exercise of the regal power, and to none other. I have no occasion to meddle with the distinction between Kings *de facto* and Kings *de jure*, because the warmest advocates for that distinction, and for the principles on which it hath been founded, admit, that even a King *de facto*, in the full and sole possession of the Crown, is a King within the statute of treasons; it is admitted too, that, the throne being full, any other person, out of possession but claiming title, is no King within the act, be his pretensions what they may.

These principles, I think no lawyer hath ever yet denied. They are founded in reason, equity and good policy.

SECT. 9.  
It is due to a  
king before his  
coronation.

SECT. 9. A prince succeeding to the Crown by descent, or by a *previous designation of Parliament*, is, from the moment his title accrueth, a King to all intents and purposes within the statute of treasons; antecedently to his own coronation, or to any oaths or engagements taken to him on the part of the

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† At the gaol-delivery for the city of Bristol in August 1758 Peter Moheret, a French prisoner of war, was indicted for privately stealing in the shop of a goldsmith and jeweller a diamond ring valued at 20*l*. I thought it highly improper to proceed capitally upon a local statute against a prisoner of war: and therefore advised the jury to acquit him of the circumstance of stealing in the shop and to find him guilty of simple larceny to the value laid in the indictment. Accordingly he was burnt in the hand and sent to the prison appointed for French prisoners.

subject.

subject. For as, on the one hand, the solemnity of a coronation doth not *confer*, but *presupposeth* a right to the allegiance of the subject inherent in the person of the King; so, on the other, the duty of allegiance doth not flow from any oaths or engagements taken on the part of the subject; for in both cases an antecedent duty is presupposed, which is intended to be secured by those explicit engagements.

I am however very far from thinking, that the solemnity of a coronation is to be considered among us merely as a royal ceremony, or as a bare notification of the descent of the Crown, as authors of high distinction have been pleased to express themselves. I admit that it is, on the part of the nation, a publick solemn recognition, that the regal authority, and all the prerogatives of the Crown are vested in the person of the King, antecedently to that solemnity. But the solemnity of a coronation with us goeth a great deal farther. The coronation oath importeth, on the part of the King, a publick solemn recognition of the fundamental rights of the people; and concludeth with an engagement, under the highest of all sanctions, that he will maintain and defend those rights, and to the utmost of his power make the laws of the realm the rule and measure of his conduct.

Coke and Hale  
(3 Inst. 7.  
1 Hale 61, 101.)

SECT. 10. The reader observeth, that in the preceeding section I take it for granted that a title to the Crown may be founded, as well on a designation by Parliament, as on hereditary descent. I never entertained a doubt of this matter, though I am aware that some lawyers of high rank have gone upon a contrary principle; for though the Crown hath, upon principles of great wisdom and sound policy, been, in all ages, considered as a descendable right, vested in and appropriated to the royal line, and hath in fact continued in that line ever since the conquest, yet it is certain that the course of descent in that line hath been frequently interrupted by the authority of Parliament.

Sect. 10.  
Parliament may  
alter the descent  
of the crown.

SECT. 11. Lord Chief-Justice *Hale*, after mentioning the cases of *Ed. II.* and *R. II.*, is pleased to say, that the former

Sect. 11.  
A king who  
hath resigned,  
or is deposed.  
1 Hale 105.

was

was considered by Parliament, *even after his resignation and deposition*, as a King against whom high treason might be committed. This he groundeth on the attainders of those who were concerned in the murder of him. But those attainders seem to me to have been grounded singly on a principle of law, which then prevailed, *that compassing the death of the father of the King was high treason*: and Lord Chief-Justice Coke accounteth for those attainders upon this principle, and upon no other.

3 Inst. 7.

See Disc. IV.

I have in another discourse entered largely into this question, and those touched upon in the 8th and 10th sections; and therefore I say no more of them in this place.

Sect. 12.  
Benefit of  
clergy in trea-  
son.

25 E. III.  
Stat. 3. C. 4.

SECT. 12. I will conclude this introduction with a few words, touching clergy in the case of treason.

The statute *de clero* provideth, that clerks, convict for treasons or felonies touching *other persons than the King himself or his royal Majesty*, shall have the privilege of holy church. In consequence of this statute mere felonies of all kinds became intitled to clergy; and petit treason likewise became so intitled, till ousted by statute. It was treason of a more private nature, and not in consideration of law committed against the *person of the King or his royal Majesty*.

As the benefit of clergy in the case of felony is not confined to such offences as were felony at the time of making this statute, but in favour of life, or rather of, what the ignorance and superstition of former times called, *the privilege of holy church*, is extended to all new-created felonies, unless taken away by the statute creating such felony, or by some other; so, on the other hand, by parity of reason and in justice to the Crown and the publick, all new-created treasons, which in judgment of law are levelled at *the person of the King or his royal Majesty*, are excluded, without special words for that purpose, as coming within the exception of this statute.

a Hale 332.

*Hale*, it is true, saith, that in all cases of high treason, whether declared so by the statute of treasons or newly enacted since, the privilege of clergy is taken away. The rule is general, but, I apprehend, the learned author must be understood with

with some limitation. All sorts of high treason, *touching the person of the King or his royal Majesty*, come within the exception in the statute *de clero*, and consequently are ousted without special words: but when offences of a more private nature, which, for the most part, terminate in an injury done to particulars, have, by reason of their odiousness and for publick example, been made high treason, or when that hath been attempted, of which the instances have been very rare, it hath been deemed expedient to take away clergy by express words for that purpose; for such new-created treasons, of a private nature, could not, with any sort of propriety, be said to touch *the person of the King or his royal Majesty*.

I will give a few instances of each kind of statute-treasons, which will serve to explain and establish the distinction I am aiming at.

The new-created treasons concerning the coin and seals are treasons *of the same kind* with those declared so by the statute of treasons, and come under the same rule. They are all treasons *against the royal Majesty of the King*.

The treasons created by statutes made for abolishing the papal and establishing the regal supremacy, for avoiding doubts touching the succession of the Crown and for establishing such succession, for the punishment of seditious and defamatory libels tending to create doubts and suspicions touching the King's title or government or the royal issue;—these treasons and others of the like nature, of which instances more than enough may be met with in the Statute-book, having a direct tendency in the judgment of the legislature to disturb the peace and tranquility of the kingdom, and to endanger the stability of the government, come within the exception of the statute *de clero*, as being treasons touching *the person of the King or his royal Majesty*; and accordingly such of them as still exist are ousted of clergy without any express provision for that purpose.

But with regard to the lower species of treasons hinted at above as terminating in injuries done to particulars, the law hath been taken to be otherwise.

The

C. 9.

The 22d of *H. VIII.* made wilful poisoning high treason, and enacted that the offenders should be boiled to death. *This act by exprefs words took away clergy.*

Cotton's Abr.  
684.

In the 8th of *Edw. IV.* a petition was tendered to the King in Parliament by both houses, which, in those days, was the ordinary method of tendering bills for the royal assent, that sacrilege should be deemed high treason and the offenders *burnt to death*. Here likewise provision was made by exprefs words, that clergy should be taken away, and the appeal for restitution saved. To this extraordinary petition the King returned an answer, becoming the royal Majesty of the Crown.

LE ROY S'AVISERA.

The use I make of these precedents is to shew, that in the case of these inferior treasons, terminating in injuries done to particulars, it was thought expedient to take away clergy by exprefs words for that purpose, these treasons not being considered as done against *the person of the King or his royal Majesty*.

8 H. VI. c. 6.  
See Raftal's  
Statutes.

The 8th of *Hen. VI.* may seem to be an exception to the rule I am advancing; for it made the wilful burning of houses, under some *special circumstances therein mentioned bordering upon acts of open hostility*, high treason, without any exprefs ouster of clergy.

1 Hale 571.  
2 Hale 346.

But *Hale* informeth us, that some gentlemen of the profession in his time considered the offence of mere *arson*, unattended with circumstances of special aggravation, as an act of *publick hostility*, and therefore ousted at common law and not helped by the statute *de clero*; and that *Noy* declared this to be his opinion in the court of King's Bench about the 8th of *Charles I.* He adds, "And this seemed to be assented to by the court."

The learned judge doth not himself assent to it. But it is plain, that the legislature, in framing the act of the 8th of *Hen. VI.* considered the offence of burning houses and destroying goods, *under the circumstances of deep aggravation therein mentioned*, as an offence of a treasonable kind antecedently to that act: and therefore probably they might not think it necessary to oust clergy by exprefs words for that purpose.

The



The preamble recited, that the houses and goods of divers persons had been then lately feloniously and *traiterously* burnt and destroyed. The statute then enacted, that *such* burning of houses should be adjudged high treason; and that this ordinance should extend to all *such* burnings *since the first day of the King's reign*, as well as to all future burnings.

A retrospect of more than seven years, in a case so penal, would have been thought a most extraordinary measure, if the offence had not, in the judgment of that Parliament, partaken of the nature of high treason *antecedently* to the statute: nor could former offences of the like kind, upon any other supposition, be with propriety said to have been *traiterously* committed.

## C H A P. I.

## CHAP. I.

## Of High Treason in Compassing the King's Death.

THE antient writers, in treating of felonious homicide, considered the felonious intention manifested by *plain facts*, not by bare words of any kind, in the same light in point of guilt, as homicide itself. The rule was *voluntas reputatur pro facto*: and while this rule prevailed, the nature of the offence was expressed by the term *compassing* the death.

*Compassing* the death of another.  
3 Inst. 5.

Ibid.

This rule hath been long laid aside as too rigorous in the case of common persons. But in the case of the King, Queen, and Prince, the statute of treasons hath, with great propriety, retained it in its full extent and rigour: and in describing the offence hath likewise retained the antient mode of expression.

"When a man doth *compass* or *imagine* the death of our Lord the King, or of our Lady his Queen, or their eldest son and heir,—and thereof be upon sufficient proof [*provablement*] attained of open deed by people of his condition."

25 E. III. st. 5.  
c. 2.

SECT. 1. The words of the statute descriptive of the offence must be strictly pursued in every indictment for this species of treason. It must charge, that the defendant did *traiterously compass*

Sect. 1.  
Form of indictments.

(1 Hale 108.  
2 Hale 187.)

N

*compass*

## CHAP. I.

Kel. 8.

*compass and imagine &c.*, and then go on and charge the several overt acts as the means employed by the defendant for executing his traitorous purposes. For the compassing is considered as the treason, the overt acts as the means made use of to effectuate the intentions and imaginations of the heart: and therefore in the case of the regicides the indictment charged, that they did traiterously compass and imagine the death of the King; and the taking off his head was laid, among others, as an overt act of compassing; and the person who was supposed to have given the stroke was convicted on the same indictment.

V. c. 2. f. 13.

From what hath been said it followeth, that in every indictment for this species of treason, and indeed for levying war, or adhering to the King's enemies, an overt act must be alleged and proved. For the overt act is the charge, to which the prisoner must apply his defence. But it is not necessary, that the whole detail of the evidence intended to be given should be set forth; the common-law never required this exactness, nor doth the statute of King *William*, which will be considered in its proper place, require it. It is sufficient, that the charge be reduced to a reasonable certainty, so that the defendant may be apprized of the nature of it, and prepared to give an answer to it.

1 Hale 122.  
4 St. Tri.  
Lowick,  
6 St. Tri.  
Layr.

And if divers overt acts are laid and but *one proved*, it will be sufficient, and the verdict must be for the Crown: and therefore, where divers overt acts are laid, and the indictment in point of form happeneth to be faulty with regard to some of them, the court will not quash it for those defects; because that would deprive the Crown of the opportunity of proving the overt acts which are well laid.

Sect. 2.  
Propriety of the  
law.

SECT. 2. I have said, that in the case of the King the statute of treasons hath, with great propriety, retained the rule, *voluntas pro facto*. The principle upon which this is founded is too obvious to need much enlargement. The King is considered as the head of the body-politick, and the members of that body are considered as united and kept together by a political union

union with him and with each other. His life cannot, in the ordinary course of things, be taken away by treasonable practices without involving a whole nation in blood and confusion; consequently every stroke levelled at his person is, in the ordinary course of things, levelled at the publick tranquillity. The law therefore tendereth the safety of the King with an anxious concern, and, if I may use the expression, with a concern bordering upon jealousy. It considereth the wicked imaginations of the heart in the same degree of guilt as if carried into actual execution, from the moment *measures appear to have been taken to render them effectual*: and therefore, if conspirators meet and consult how to kill the King, though they do not then fall upon any scheme for that purpose, this is an overt act of compassing his death; and so are all means made use of, be it advice, persuasion or command, to incite or encourage others to commit the fact, or to join in the attempt; and every person who but assenteth to any overtures for that purpose, will be involved in the same guilt.

CHAP. I.

1 Hale 119;  
Kel. 17.

And if a person be but once present at a consultation for such purposes and conceal it, *having had a previous notice of the design of the meeting*, this is an evidence proper to be left to a jury of such assent, though the party say or do nothing at such consultation. The law is the same if he is present at more than one such consultation, and doth not dissent or make a discovery. But in the case of once falling into the company of conspirators, if the party met them accidentally or upon some indifferent occasion, bare concealment without express assent will be but misprision of treason. The law was formerly more strict in this respect; *Si ad tempus dissimulaverit et subti-cuerit, quasi consentiens & assentiens, erit seductor Domini Regis manifestus*.

Kel. 17, 21.  
4 St. Tri. 680.Braet. de coron.  
c. 3. l. 1.

SECT. 3. The care the law hath taken for the personal safety of the King is not confined to actions or attempts of the more flagitious kind, to assassination or poison, or other attempts directly and immediately aiming at his life. It is extended to every thing wilfully and deliberately done or attempted, whereby his life may be endangered: and therefore the entering into measures for depoling or imprisoning

Sect. 3.  
Overt acts of  
compassing.

## CHAP. I.

him, or to get his person into the power of the conspirators,—these offences are overt acts of treason within this branch of the statute; for experience hath shewn, that between the prisons and the graves of Princes the distance is very small.

Sect. 4.  
Other overt  
acts of con-  
spiring.

Dr. Storey's  
case, cited,  
p. 183.

SECT. 4. Offences which are not so personal, as those already mentioned, have been with great propriety brought within the same rule; as having a tendency, though not so immediate, to the same fatal end: and therefore the entering into measures in concert with foreigners and others in order to an invasion of the kingdom, or going into a foreign country, or even purposing to go thither to that end *and taking any steps in order thereto*,—these offences are overt acts of compassing the King's death.

4 St. Tri. 406  
&c.

Lord *Preston* and two other gentlemen had procured a smack to transport them to *France*, but were stopped before they got out of the river, and their papers seized. Among the papers was found a scheme intended to be laid before the *French King* or his ministers, for invading the kingdom in favour of the late King *James* the second; with many letters, notes and *memoranda*, all tending to the same purpose. Lord *Preston* upon his trial insisted, among other matters, that *no overt act was proved upon him in Middlesex*, where all the overt acts were laid; for he was taken with the papers in the county of *Kent*. But the court told the jury, that if, upon the whole evidence, they did believe that his lordship had an intention of going into *France* and carrying those papers thither *for the purposes charged in the indictment*, his taking boat at *Surry Stairs*, which are in *Middlesex*, in order to go on board the smack, was a sufficient overt act in *Middlesex*. Every step taken for those purposes was an overt act. Chief-Justice *Holt*, Chief-Justice *Pollexfen*, and Chief-Baron *Atkins* delivered their opinions *seriatim* to this purpose, all the other judges present concurring.

The offence of inciting foreigners to invade the kingdom is a treason of signal enormity. In the lowest estimation of things and in all possible events, it is an attempt, on the part of the offender, to render his country the seat of blood and  
defolation;

desolation; and yet, unless the powers so incited happen to be actually at war with us at the time of such incitement, the offence will not fall within any branch of the statute of treasons, except that of compassing the King's death: and therefore, since it hath a manifest tendency to endanger the person of the King, it hath, in strict conformity to the statute, and to every principle of substantial political justice, been brought within that species of treason of compassing the King's death; *ne quid detrimenti respublica capiat.*

CHAP. I.  
(Hale 167.)

SECT. 5. Lord *Coke* seemeth to have been of opinion, that an offence falling under one branch of the statute cannot be deemed an overt act of a different species of treason. I believe Lord *Hale* did once fall into the same opinion; for in his summary, speaking of conspiracy to levy war, he saith, it is no overt act of compassing the King's death, *because it relateth to a distinct treason.* But *Hale* altered his opinion; and it is every day's experience, that many offences, falling directly and by name under other branches of the statute, may be brought within this of compassing the King's death. Levy-  
ing war is an overt act of compassing \*; and, under the limita-  
tions stated in the next chapter, conspiring to levy war like-  
wise is an overt act within this branch; and so is a treason-  
able correspondence with the enemy, though it falleth more  
naturally within the clause of adhering to the King's enemies: and in the case of *Patrick Harding*, the railing men with intent to dethrone the King, and sending them abroad to join for that purpose with the forces of *France* then at open war with us, which, had the overt act been properly laid, would have fallen within the clause of *adhering*, was ruled to be an overt act of compassing the King's death: and in Lord *Preston's* case before cited, he and the other gentlemen were indicted upon both branches of the statute, *compassing the death, and adhering*; and the composing, procuring, and secreting the treasonable papers, their taking boat to go on board the smack, and carrying the papers with them in order to be made use of in

Sect. 5.  
Overt acts of  
treason.  
3 Inst. 14.

Sum. 13.

Hale 119—  
123.

2 Vent. 315.

\* See Stat. 29. H. VI. *Jack Cade's* rebellion was deemed an overt act of compassing. See chap. 2. s. 3, 6, 8. touching these matters.

CHAP. I. *France* for the treasonable purposes charged in the indictment,—these facts were all laid as overt acts of *both* species of treason.

SECT. 6.  
Treasonable  
writings.

*By Mr. C.*

(1 Hale 118.)

SECT. 6. How far words or writings of a seditious nature may be considered as overt acts within this branch of the statute hath been the subject of much debate. In Mr. *Sidney's* case it was said, *Scribere est agere*. This is undoubtedly true under proper limitations, but it was not applicable to his case. Writing being a deliberate act and capable of satisfactory proof certainly may, under some circumstances with publication, be an overt act of treason: and I freely admit, that had the papers found in Mr. *Sidney's* closet been plainly relative to the other treasonable practices charged in the indictment, they might have been read in evidence against him, though not published.

The papers found in Lord *Preston's* custody, those found where Mr. *Laver* had lodged them, the intercepted letters of Doctor *Hensley*, were all read in evidence as overt acts of the treason respectively charged on them; and *William Gregg's* intercepted letter might, in like manner, have been read in evidence, if he had put himself upon his trial\*. For those papers and letters were written in prosecution of certain determinate purposes, which were all treasonable and then in contemplation of the offenders, and were plainly connected with them. But papers not capable of such connection, while they remain in the hands of the author unpublished, as Mr. *Sidney's* did; will not make a man a traitor. Lord *Hale* in the place last cited mentioneth two circumstances as concurring to make words reduced into writing overt acts of compassing the King's death, that they be published, and that they import such compassing.

Cro. Car. 115.

True it is, that in *Peacham's* case a MS. sermon, in which were some treasonable passages, found in his study, never, for aught appearing, preached or published or intended to be so, was thought to bring him within this branch of the statute;

\* See the cases of *Hensley* and *Gregg* in the next chap. f. 8.

and accordingly he was found guilty, *but not executed*. For whatever rule the court of King's Bench, where he was tried, might lay down, "many of the judges, saith *Croke*, were of "opinion, that it was not treason." This case therefore weigheth very little; and no great regard hath been paid to it ever-since.

And perhaps still less regard will be paid to it if it be considered, that the King, who appeareth to have had the success of the prosecution much at heart, and took a part in it unbecoming the Majesty of the Crown, condescended to instruct his attorney-general with regard to the proper measures to be taken in the examination of the defendant; that the attorney, at his Majesty's command, submitted to the drudgery of sounding the opinions of the judges upon the point of law, before it was thought advisable to risque it at an open trial; that the judges were to be sifted separately and soon, before they could have an opportunity of conferring together; and that, for this purpose, four gentlemen of the profession in the service of the Crown were immediately dispatched, one to each of the judges; Mr. Attorney himself undertaking to practise upon the Chief-Justice, of whom some doubt was then entertained.

James I.

Bacon.

Coke

Is it possible, that a gentleman of *Bacon's* great talents could submit to a service so much below his rank and character! But he did submit to it, and acquitted himself notably in it.

Avarice, I think, was not his ruling passion. But when ever a false ambition, ever restless and craving, over-heated in the pursuit of the honours which the Crown alone can confer, happeneth to stimulate an heart otherwise formed for great and noble pursuits, it hath frequently betrayed it into measures full as mean as avarice itself could have suggested to the wretched animals who live and die under it's dominion. For these passions, however they may seem to be at variance, have ordinarily produced the same effects. Both degrade the man, both contract his views into the little point of self-interest, and equally steel the heart against the rebukes of conscience, or the sense of true honour.

*Bacon*, having undertaken the service, informeth his Majesty in a letter addressed to him, that with regard to three

CHAPT. I.

of the judges whom he nameth, he had small doubt of their concurrence; "Neither, saith he, am I wholly out of hope, that my Lord Coke himself, when I have in some dark manner put him in doubt that he shall be left alone, will not continue singular." These are plain naked facts, they need no comment\*. Every reader will make his own reflections upon them. I have but one to make in this place. This method of forestalling the judgment of a court in a case of blood then depending, at a time too when the judges were removable at the pleasure of the Crown, doth no honour to the memory of the persons concerned in a transaction so insidious and unconstitutional; and at the same time greatly weakeneth the authority of the judgment.

Sect. 7.  
Mere words  
are not treason.

SECT. 7. As to mere words supposed to be treasonable, they differ widely from writings in point of real malignity and proper evidence. They are often the effect of mere heat of blood, which, in some natures otherwise well disposed, carrieth the man beyond the bounds of decency or prudence. They are always liable to great misconstruction from the ignorance or inattention of the hearers, and too often from a motive truly criminal. And therefore I choose to adhere to the rule which hath been laid down on more occasions than one since the revolution, that loose words, *not relative to any act or design*, are not overt acts of treason. But words of advice or persuasion, and all consultations for the traitorous purposes treated of in this chapter are certainly so. They are uttered in contemplation of some traitorous purpose actually on foot or intended, and in prosecution of it.

4 St. Tri. 381,  
645.

1 Hale 111—  
115, 323.  
3 Inst. 14.

Lord Chief-Justice *Hale* was of opinion, that bare words are not an overt act of treason, *Coke* was of the same opinion. *Hale* hath treated the subject pretty much at large, and I shall not repeat his argument; but I must say, that I think

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\* See *Bacon's* letters in the 4th edition of his works 1740. lett. 111, 112, 114, 116, 117. Others of his letters shew, that the same kind of intercourse was kept up between the King and his attorney-general with regard to many cases then depending in judgment, in which the King was pleased to take a part, or thought his prerogative concerned; particularly in the case of one *Owen* executed for treasonable words, in that of Mr. *Oliver St. John* touching the benevolence, in the dispute between the courts of King's Bench and Chancery in the case of the *Præmunire*, and in the proceedings against the Earl and Countess of *Somerset*.

his



his reasons founded on temporary acts or acts since repealed, which make speaking the words therein set forth *felony or misdemeanor*, are unanswerable; for if those words, seditious to the last degree, had been deemed overt acts within the statute of treasons, the legislature could not, with any sort of consistency, have treated them as felony or misdemeanor\*.

The same use may be made of the acts passed in the time of the late Queen for the security of her Majesty's person and government, and of the succession to the Crown in the protestant line. These acts provide, that every person who should maliciously, advisedly and directly by *writing or printing* affirm, that the Queen was not the rightful Queen of these realms, or that the pretender had any right or title to the Crown, or that any other person had any right or title, otherwise than according to the acts passed since the revolution for settling the succession, or that the legislature hath not sufficient authority to make laws for limiting the succession, should be guilty of high treason and suffer as a traitor; and then enact, that if any person shall *maliciously and directly by preaching, teaching, or advised speaking* declare and maintain the same, he shall incur the penalties of a *præmunire*.

4 Annæ, c. 8.

6 Annæ, c. 7.

I will make a short observation or two on these acts.

1st, The positions condemned by them had as direct a tendency to involve these nations in the miseries of an intestine war, to incite her Majesty's subjects to withdraw their allegiance from her, and to deprive her of her Crown and royal dignity, as any general doctrine, any declaration *not relative to actions or designs*, could possibly have; and yet in the case of bare words, positions of this dangerous tendency, though maintained *maliciously, advisedly, and directly*, and even in the solemnities of *preaching and teaching*, are not considered as overt acts of treason.

2dly, In no case can a man be *argued* into the penalties of the acts by inferences and conclusions drawn from what he

\* The like use hath been made of temporary statutes which make words in certain cases treason: but I do not build upon them; I rely on those which make words *felony or misdemeanor*.

hath

CHAP. I. hath affirmed. The criminal position must be *directly* maintained, to bring him within the compass of these acts.

3dly, Nor will every rash, hasty, or unguarded expression, owing perhaps to natural warmth, or thrown out in the heat of disputation, render any person criminal within these acts; the criminal doctrine must be maintained *maliciously and advisedly*.

Such caution did the legislature use in framing these statutes made in the zeal of the times, a most laudable zeal it was, for purposes of no less importance than the security of her then Majesty's person and government, and of the succession to the Crown in his present Majesty's royal house; a caution formerly used in similar cases, and not unworthy of imitation in framing future acts of the like kind, if any such shall be thought necessary; and which may serve as a faithful monitor in the conduct of prosecutions for words or writings supposed to be treasonable, but not relative to any treasonable measure then on foot or intended to be taken.

Sect. 8.  
Words connected with facts may be treasonable.

SECT. 8. The rule I cited in the last section from the State Trials is in my opinion very properly guarded, being confined to words, *not relative to any act or design*; for words connected with facts, or expressive of the intention of the speaker, may, under some circumstances, bring him within the statute of treasons. *Croft* being beyond sea said, "I will kill the King of England, if I can come at him," and the indictment, after setting forth the words, charged, that *he came into England for that purpose*.

Kel. 13.  
1 Hal. 116.  
Cro. Car. 332.

In this case the words, though laid in the indictment as one of the overt acts, could not be so properly deemed an overt act of treason, as an evidence against the man out of his own mouth, *QUO ANIMO he came into England*. The traitorous intention, proved by his words, converted an action, innocent in itself, into an overt act of treason.

4 St. Tri. 645.

Kel. 13.

Lord Chief-Justice *Kelyng* hath cited this case from *Crake* very imperfectly, and hath drawn a conclusion from it, which, if properly stated, it would not have borne. He saith it was resolved,

resolved, "That in case a man be indicted only for words; that is not high treason. But if a man be indicted for compassing the King's death, there words may be laid as an overt act to prove that he compassed the death of the King, as it was in the case of *Crobagan*; who being beyond sea spake these words, *I will kill the King if I can come at him*; and afterwards he came into *England* and was taken and indicted for compassing the King's death; and these words laid as an overt act and proved, and he had judgment of high treason."

From the case *thus cited* and the rule that is grounded on it, a reader would be induced to conclude, that the words were the *only* overt act laid, which is far from being the truth of the case. It is true, the words were laid as an overt act, but they were not the *only* overt act laid; for the indictment farther charged, that the man came into *England for the purpose of killing the King*. This material part of the case is entirely dropped; and consequently this case, thus partially stated, doth not establish the doctrine in the latitude there laid down.

The author in the same page endeavoureth to put writings and words upon one and the same foot; "Words, saith he; set down in writing are an overt act to prove the compassing the King's death, and words *spoken* are the same thing, *if they be proved*; and words are the natural way for a man whereby to express the imagination of the heart."

His Lordship reasoneth in this passage as if he considered the overt acts, required by the statute, merely as *matters of evidence*, tending to discover the imaginations of the heart. Overt acts undoubtedly do discover the man's intentions; but, I conceive, they are not to be considered merely as evidence; but as the means made use of to effectuate the purposes of the heart.

With regard to homicide, while the rule *voluntas pro facto* prevailed, the overt acts of compassing were so considered. In the cases cited by *Coke* there were plain flagitious attempts upon the lives of the parties marked out for destruction: and though in the case of the King overt acts of less malignity, and having a more remote tendency to his destruction, are, with

Inst. 5.

## CHAP. I.

*appele P., que illonques est, de ceo, que come il fuit en tiel certain lieu, a tiel certain jour, tiel an, la oya mesme cestuy P. purparler tiel mort ou tiel treason \* [parenter cestuy P. & un auter tiel par nosme, & par tiels aliances. Et que cestuy P. issint le fist & issint le purparla felonisement come selon, & treyturement come traytair, cestuy I. est prist a prover par son corps.]* This precedent plainly importeth a meeting of the conspirators and a consultation between them for the traiterous purposes therein mentioned. The words, *purparler parenter cestuy P. & un auter, & par tiels aliances* can mean nothing less. This passage therefore proveth nothing with regard to bare words not relative to actions; since a consultation for taking away the King's life undoubtedly was an overt act at the common-law, and is so under the statute.

The citations from *Bracton* and *Fleta* will be found to prove as little, if the words *prælocutus fuit mortem* import a consultation with others to that purpose: and that they do so, appeareth highly probable from one of the pleas which *Fleta* putteth into the defendant's mouth, *ad hoc, quod accusans dicit quod prælocutio fuit in præsentia talium, respondere poterit, quod nunquam cum prædictis talibus colloquium habuit*. However, since all these authors, short and obscure as they are, professedly treat of the same matter, if *Bracton* and *Fleta* may be explained by *Britton*, who did not write long after them, these passages prove nothing to the point for which they have been cited.

The precedent Lord *Coke* fetcheth from the days of King *Edmund* will receive the same answer. For it chargeth, that the conspirators, naming them, *ET AUTERS*, met and consulted by what means to kill or imprison the King, and engaged to each other to keep their treason secret; and to furnish each of them to the utmost of his power the means for effecting it.

It may be thought I have taken up too much of the reader's time in examining this opinion of Lord *Coke*, because, as I said before, he admitteth, that *since the statute* words alone will not make a man a traitor. "There must, saith he, be an overt-  
" deed; but words without an overt-deed are to be punished

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\* All the words between the hooks are omitted by *Coke*.

"in another degree as an high misprision." But if it be admitted, that bare words, not relative to actions, did at common-law amount to an overt-deed, I doubt the words *open deed* in the statute, on which this learned author relieth, have not altered the case; since the single question is, what doth or doth not amount to an open deed. All the words descriptive of the offence, "If a man shall compass or imagine, and thereof be attainted of open deed," are plainly borrowed from the common-law; and therefore must bear the same construction they did at common-law, unless there be any thing in the statute which will necessarily lead us to another.

This hath been urged with some advantage by a good modern writer on the crown-law, the best we have except *Hale*, 1 Hawk. c. 17, f. 39. against his Lordship's construction of the statute. It is, I confess, a good argument *ad hunc*, but it cannot be carried farther. However, lest it should, I thought it would be time not wholly mispent to shew, that the doctrine his Lordship hath advanced upon the foot of common-law is not supported by any of the authorities to which he hath appealed.

I have considered the question touching words and writings supposed to be treasonable the more largely, not only because of the diversity of opinions upon it; but likewise for the great importance of the point, and the extreme danger of multiplying treasons upon slight occasions.

I cannot conclude this chapter without putting the reader in mind of a fine passage, which I borrow from the Baron *de Montesquieu*, worthy the attention of all persons concerned in framing penal laws or putting them in execution. "*Sylla*, "saith that excellent writer, who confounded tyranny, anarchy, "and liberty, made the *Cornelian* laws. He seemed to have "contrived regulations merely with a view to create crimes. "Thus distinguishing an infinite number of actions by the "name of murder, he found murderers in all parts. And by a "practice *but too much followed* he laid snares, sowed thorns, "and opened precipices, wheresoever the citizens set their "feet." Spirit of Laws, b. 6, c. 15.

## CHAP. II.

## C H A P. II.

## Of levying War and adhering to the King's enemies.

Military weapons not necessary.

Hale 131, 141, 150 to 153.

**L**ORD Chief-Justice *Hale*, speaking of such unlawful assemblies as may amount to a levying of war within the 25 E. III, taketh a difference between those insurrections which have carried the appearance of an army formed under leaders, and provided with military weapons, and with drums, colours &c, and those other disorderly tumultuous assemblies which have been drawn together and conducted to purposes manifestly unlawful, but without any of the ordinary shew and apparatus of war before mentioned.

I do not think any great stress can be laid on that distinction. It is true, that in case of levying war the indictments generally charge, that the defendants were armed and arrayed in a warlike manner; and, where the case would admit of it, the other circumstances of swords, guns, drums, colours &c have been added. But I think the merits of the case have never turned singly on any of these circumstances.

V. Sect. 7.

In the cases of *Damaree* and *Purchase*, which are the last printed cases which have come in judgment on the point of constructive levying war, there was nothing *given in evidence* of the usual pageantry of war, no military weapons, no banners or drums, nor any regular consultation previous to the rising; and yet the want of these circumstances weighed nothing with the court, though the prisoners' counsel insisted much on that matter. The number of the insurgents supplied the want of military weapons; and they were provided with axes, crowes, and other tools of the like nature, proper for the mischief they intended to effect.

— *Furor arma ministrat.*

Sect. 1.  
The true criterion stated in this and six following sections.

SECT. I. The true criterion therefore in all these cases is, *Quo animo* did the parties assemble? For if the assembly be

be upon account of some *private* quarrel, or to take revenge on *particular* persons, the statute of treasons hath already determined that point in favour of the subject. "If, saith the statute, any man ride armed *openly* [so the word *discover* ought to have been rendered], or secretly with men of arms against any other to slay or to rob him, or to take and keep him till he make fine for his deliverance, it is not the mind of the King nor his council, that in such case it shall be judged treason; but it shall be judged felony or trespass according to the law of the land *of old time used* and according as the case requirith." Then immediately followeth another clause, which reacheth to the end of the statute, and provideth, that, if in such case *or other like* the offence had then-tofore been adjudged treason, whereby the lands of the offenders had come to the Crown as forfeit, the Lords of the fee should notwithstanding have the escheat of such lands, saving to the Crown the year and waft.

I will make a short observation or two on these clauses.

1st, The first clause is evidently declaratory of the common-law; it shall be adjudged felony or trespass *according to the law of the land of old time used*. The second hath a retrospect to some late judgments in which the common-law had not taken place; and giveth a speedy and effectual remedy to Lords of the Fee who had suffered by those judgments.

2dly, The words of the first clause descriptive of the offence, "if any man ride armed openly or secretly with men of arms," did, in the language of those times, mean nothing less than the assembling bodies of men, friends, tenants or dependants, armed and arrayed in a warlike manner in order to effect some purpose or other by dint of numbers and superior strength; and yet these assemblies so armed and arrayed, if drawn together for purposes of a *private* nature, were not deemed treasonable.

3dly, Though the statute mentioneth only the cases of assembling to kill, rob or imprison, yet these, put as they are by way of example only, will not exclude others which may be brought within the same rule; for the retrospective clause provideth, that if in such case *or other like* it hath been ad-

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judged.

## CHAP. II.

judged.—What are the other like cases? All cases of the like private nature are, I apprehend, within the reason and equity of the act. The case of the Earls of *Gloucester* and *Hereford*, and many other cases cited by *Hale*, some before the statute of treasons, and others after it,—those assemblies, though attended many of them with bloodshed and with the ordinary apparatus of war, were not holden to be treasonable assemblies; for they were not, in construction of law, raised against the King or his Royal Majesty, but for purposes of a private personal nature.

1 Hale 80, 135,  
147, 260.

## SECT. 2.

(1 Hale 131,  
133, 149, 260.)

SECT. 2. Upon the same principle and within the reason and equity of the statute, risings to maintain a *private* claim of right, or to destroy *particular* inclosures, or to remove nuisances, which affected or were thought to affect in point of *interest* the parties assembled for these purposes, or to break prisons in order to release *particular* persons without any other circumstance of aggravation, have not been holden to amount to levying war within the statute.

And upon the same principle and within the same equity of the statute, I think it was very rightly holden by five of the judges, that a rising of the weavers in and about *London* to destroy all engine-looms, machines which enabled those of the trade who made use of them to undersell those who had them not, did not amount to levying war within the statute; though great outrages were committed on that occasion, not only in *London* but in the adjacent counties, and the magistrates and peace-officers were resisted and affronted.

1 Hale \*143  
to \*146.

For those judges considered the whole affair merely as a *private quarrel between men of the same trade about the use of a particular engine, which those concerned in the rising thought detrimental to them.* Five of the judges indeed were of a different opinion: but the attorney-general thought proper to proceed against the defendants as for a riot only.

SECT. 3.  
(1 Hale 131,  
132)

SECT. 3. But every insurrection which in judgment of law is intended against the person of the King, be it to de-  
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throne or imprison him, or to oblige him to alter his measures of government, or to remove evil counsellors from about him,—these risings all amount to levying war within the statute, whether attended with the pomp and circumstances of open war or not: and every conspiracy to levy war for these purposes, though not treason within the clause of levying war, is yet an overt act within the other clause of compassing the King's death. For these purposes cannot be effected by numbers and open force without manifest danger to his person\*.

CHAP. II.

(1 Hale 109,  
110, 119—122,  
148.)  
4 St. Tri. 613,  
614

SECT. 4. Insurrections in order to throw down all inclosures, to alter the established law or change religion, to enhance the price of all labour or to open all prisons,—all risings in order to effect these innovations of a publick and general concern by an armed force are, in construction of law, high treason, within the clause of levying war: for though they are not levelled at the person of the King, they are against his Royal Majesty; and besides, they have a direct tendency to dissolve all the bonds of society, and to destroy all property and all government too, by numbers and an armed force. Insurrections likewise for redressing national grievances, or for the expulsion of foreigners in general, or indeed of any single nation living here under the protection of the King, or for the reformation of real or imaginary evils of a public nature and in which the insurgents have no special interest,—risings to effect these ends by force and numbers are, by construction of law, within the clause of levying war: for they are levelled at the King's Crown and Royal Dignity.

Sect. 4.

(1 Hale 132—  
134, 153.)

SECT. 5. It was adjudged in the 16 Charles I, a season of great agitation, that going to Lambeth-house in a warlike manner to surprize the arch-bishop, who was a privy-counsellor, it being with drums and a multitude to the number of 300, was treason.

Sect. 5.

1 Hale 141,  
152. Cro. Car.  
583. Benstead's  
case.

This is a very imperfect account of an insurrection which hath found a place in the best histories of that time. The

\* The summary p. 13. layeth down a different rule, and so doth 3 Inst. 14. But the law is mistaken in these books.

CHAP. II.  
Laud's Diary.

Rushworth.

tumult happened on *Monday* the 11th of *May* 1640 about midnight. On the *Thursday* following the special commission, under which the judges sat, was opened and proceeded upon; and *Benstead* a ring-leader in the tumult was convicted, and within a very few days afterwards executed.

It is not easy from the short note of the case given by the reporters to collect the true grounds of this resolution: but the history of the times will enable us to form a probable conjecture concerning them.

Whitlock.

On the fifth of *May* the Parliament was dissolved to the general dissatisfaction of the nation: and, which greatly increased the ill-humour of the people, the convocation was, by a new commission, impowered to continue sitting, notwithstanding the dissolution of the Parliament. *And the blame and odium of both these unpopular measures were laid upon the Arch-bishop.*

Clarendon.

On *Saturday* the ninth of that month a paper was posted up at the *Exchange* exhorting the apprentices to rise and sack the Arch-bishop's house upon the *Monday* following; and accordingly on that very day an attempt was made upon *Lambeth-house* by a rabble of some thousands, with open profession and protestation, *that they would tear the Arch-bishop in pieces.*

It were to be wished, that the full import of the libel posted at the *Exchange*, in consequence of which the attempt was made, had been set out; and also that we were informed what was the cry among the rabble at the time of the attempt, more than that they would tear the Arch-bishop in pieces. These circumstances, could we come at them, would probably let us into the true reason and motives of the rising, and consequently into the reason and grounds of the opinion of the judges: for if it did appear by the libel or by the cry of the rabble at *Lambeth-house*, that the attempt was made on account of measures the King had taken or was then taking at the instigation, as they imagined, of the Arch-bishop; that the rabble had deliberately and upon a publick invitation attempted, by numbers and open force, to take a severe revenge upon the Privy-Counsellor for the measures the Sovereign had taken or was pursuing; if this may be supposed to be the case, I think the supposition

supposition is not very foreign, the grounds and reasons of the resolution would, in my opinion, be sufficiently explained, without taking that little trifling circumstance of the drum into the case. Upon such a supposition, the case came within the reason of *Talbot's case* 17 R. II. cited by *Hale*: and I think too within the rules laid down in the two preceeding sections. But without the help of some such supposition, I see nothing in the case, as stated by the report, which can amount to high treason.

1 Hale 239, 140, 260, 265.

SECT. 6. But a bare conspiracy for effecting a rising for the purposes mentioned in the two preceeding sections and in the next is not an overt act of compassing the King's death. Nor will it come under any species of treason within the 25 E. III. unless the rising be effected: and in that case the conspirators as well as the actors will all be equally guilty; for in high treasons of all kinds all the *participes criminis* are principals.

Sect. 6.

1 Hale 133.

It must be admitted, that conspiracies for these purposes have been adjudged treason: but those judgments were founded on the temporary act of 13 Eliz., which made compassing to levy war, declared by printing, writing, or advised speaking, high treason *during the life of the Queen*.

There was an act in the 13 Car. II. to the same purpose, on which some prosecutions were founded; but that act expired with the death of the King.

Kel. 19, 20.

SECT. 7. The cases of *Damaree* and *Purchase* for destroying the meeting-houses of protestant dissenters, being the last in *print* which have come in judgment upon the doctrine of constructive levying war, and having been ruled upon consideration of former precedents, I will state them somewhat largely from the printed trials.

Sect. 7.

The indictments charged, that the prisoners withdrawing their allegiance &c. and conspiring and intending to disturb the peace and publick tranquillity of the kingdom, did traitorously compass, imagine, and intend to levy and raise war, rebellion, and insurrection against the Queen within the kingdom; and that in order to complete and effect these

See 8 St. Tri 218 to 285.

their traiterous intentions and imaginations, they on the —— day of —— at —— with a multitude of people, to the number of 500, armed and arrayed in a warlike manner &c, then and there traiterously assembled, did traiterously ordain, prepare, and levy war against the Queen, against the duty of their allegiance &c.

It appeared upon the trial of these men, which I attended in the students' gallery \* at the *Old Bayley*, that upon the 1. *March* 1709, during *Dr. Sacheverell's* trial, the rabble, who had attended the doctor from *Westminster* to his lodgings in the *Temple*, continued together a short space in the *King's Bench Walks*, crying, among other cries of the day, *Down with the Presbyterians*.

At length it was proposed, by whom it was not known, to pull down the meeting-houses, and thereupon the cry became general, *Down with the meeting-houses*; and some thousands immediately moved towards a meeting-house of *Mr. Burges* a Protestant dissenting minister; the defendant *Damaree*, a waterman in the Queen's service and in her livery and badge, putting himself at the head of them, and crying, *Come on, boys, I'll lead you, Down with the meeting-houses*. They soon demolished *Mr. Burges's* and burnt the pews, pulpit, and other materials in *Lincoln's-inn-fields*. After they had finished at that place, they agreed to proceed to the rest of the meeting-houses; and hearing that the guards were coming to disperse them, they agreed, for the greater dispatch, to divide into several bodies, and to attack different houses at the same time: and many were that night in part demolished and the materials burnt in the street.

The prisoner *Damaree* put himself at the head of a party, which drew off from *Lincoln's-inn-fields* and demolished a meeting-house in *Drury-lane*, and burnt the materials in the street; still crying they would pull them all down that night.

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\* This little circumstance is mentioned for the sake of the students of the inns of court; who, coming properly habited in students' gowns, have a right to the use of the middle gallery on the left hand of the court during the trials. The officers who make money of the galleries have sometimes behaved with rudeness towards the students; but the court upon complaint hath constantly done them justice.

CHAP.

While the materials of this House were burning, the prisoner *Purchase*, who had not, for aught appeared, been before concerned in the outrages of that night, came up to the fire very drunk; and, with his drawn sword in his hand, encouraged the rabble in what they were doing, and incited them to resist the guards, who were then just come to the fire in order to disperse the multitude. He likewise assaulted the commanding officer with his drawn sword, and struck several of their horses with the same weapon; and then advancing towards the guards cried out to the rabble behind him, *Come on, boys, I'll lose my life in the cause, I will fight the best of them.*

Upon the trial of *Damaree* the cases referred to before in sect. 4 and 5 were cited at the bar, and all the judges present were of opinion, that the prisoner was guilty of the high treason charged upon him in the indictment: for here was a rising with an avowed intention to demolish *all meeting-houses in general*; and this intent they carried into execution as far as they were able. If the meeting-houses of Protestant dissenters had been erected and supported in defiance of all law, a rising in order to destroy such houses *in general* would have fallen under the rule laid down in *Kelyng* with regard to the demolishing *all bawdy-houses*. But since the meeting-houses of Protestant dissenters are, by the toleration-act, taken under the protection of the law, the insurrection in the present case was to be considered as a publick declaration by the rabble against that act, and an attempt to render it ineffectual *by numbers and open force*.

Kel. 70.

(1 Hale 134.)

Accordingly *Damaree* was found guilty, and had judgment of death as in cases of high treason.

But he was pardoned and soon afterwards restored to his badge and livery, which he wore to the death of the Queen. Her Majesty's new advisers did not choose to have the dawn of their administration stained with the blood of one of Dr. *Sacheverell's* ablest advocates.

With regard to the case of *Purchase*, there was some diversity of opinion among the judges present at his trial; because it did not appear upon the evidence, that he had any concern in the original rising, or was present at the pulling down any of the houses, or any way active in the outrages

CHAP. II. of that night; except his behaviour at the bonfire in *Drury-lane*, whither he came by mere accident, for aught appeared to the contrary.

3 St. Tri. 551.  
to 557.

The jury therefore by the direction of the court found a special verdict to the effect already mentioned.

Upon this special verdict, which in substance took in the whole transaction on the first of *March*, the judges unanimously resolved, that for the reasons mentioned at *Damarée's* trial, he and the others concerned with him in demolishing and rifling the meeting-houses were guilty of high treason in levying war against the Queen.

As to the case of *Purchase*, Chief-Justice *Trevor*, Justice *Powell* and Baron *Price* were of opinion, that, upon the facts found, he was not guilty of the charge in the indictment. But all the rest of the judges differed from them; because the rabble was traiterously assembled, and in the very act of levying war when *Purchase* joined them, and encouraged them to proceed, and assaulted the guards, who were sent to suppress them. All this being done in defence and support of persons engaged in the very act of rebellion involved him in the guilt of that treason in which the others were engaged.

This man likewise was pardoned. His case, in point of law and of real guilt too, came far short of *Damarée's*.

SECT. 8.  
Joining with  
rebels or ene-  
mies.

SECT. 8. The joining with rebels in an act of rebellion, or with enemies in acts of hostility, will make a man a traitor; in the one case within the clause of levying war, in the other within that of adhering to the King's enemies. But if this be done for fear of death, and while the party is under actual force, and he take the first opportunity that offereth to make his escape; this fear and compulsion will excuse him. It is however incumbent on the party who maketh fear and compulsion his defence, to shew, to the satisfaction of the court and jury, that the compulsion continued during all the time he staid with the rebels or enemies.

I will not say, that he is obliged to account for every day, week, or month. That perhaps would be impossible: and therefore if an original force be proved, and the prisoner can shew,

shew, that he in earnest attempted to escape and was prevented; or that he did get off and was forced back; or that he was narrowly watched, and all passes guarded; or from other circumstances, which it is impossible to state with precision, but which, when proved, ought to weigh with a jury, that an attempt to escape would have been attended with great difficulty and danger; so that upon the whole he may be presumed to have continued among them against his will, though not constantly under an actual force or fear of immediate death;—these circumstances and others of the like tendency, proved to the satisfaction of the court and jury, will be sufficient to excuse him.

But an apprehension, though ever so well grounded, of having houses burnt or estates wasted or cattle destroyed,\* or of any other mischief of the like kind, will not excuse in the case of joining and marching with rebels or enemies.

Furnishing rebels or enemies with money, arms, ammunition or other necessaries will, *primâ facie*, make a man a traitor. But if enemies or rebels come with a superior force and exact contributions, or live upon the country at free quarter, submission in these cases is not criminal: for *flagrante bello* the *jus belli* taketh place, it is the only law then subsisting; and submission is a point of the highest prudence to prevent a greater publick evil.

And the bare sending money or provisions (except in the case just excepted), or sending intelligence to rebels or enemies, which in most cases is the most effectual aid that can be given them, will make a man a traitor, though the money or intelligence should happen to be intercepted: for the party in sending did all he could; the treason was complete *on his part*, though it had not the effect he intended. †

The cases cited in the margin did not in truth turn singly upon the rule here laid down, though I think the rule may

\* These points were so ruled in the case of *McGrouther* and of many of the Scotch prisoners on the special commission in *Surry*. A<sup>d</sup> 1746. V. the Report, p. 13, 14.

† So ruled by the judges assembled in January 1707 in the case of *William Gregg*. MSS. *Tracy, Dod, Price and Denton*; and by the court of B. R. Trin. 31. of the King; in the case of *Dr. Henley*. (See *Henley's* case in 1 *Burr*. 642.)

## CHAP. II.

Sect. 4, 6.

very well be supported. For *Gregg* was indicted for *compassing the death of the Queen*, and also *for adhering to her enemies*; and *Henfey's* indictment was in the same form, and so was *Lord Preston's* cited in the last chapter; and the writing and sending the letters of intelligence, which, in the cases of *Gregg* and *Henfey*, were stopped at the post-office, was laid as an overt act of both the species of treason: so that admitting for argument's sake, which is by no means admitted, that it was not an overt act of *adhering*, since the letters never came to the enemy's hands and consequently no *aid or comfort* was actually given, yet the bare writing and sending them to the post-office, in order to be delivered to the enemy, was undoubtedly an overt act of the other species of treason. In *Gregg's* case the judges did resolve, that it was an overt act of both the species of treason charged on him; and in *Henfey's* the court adopted that opinion and cited it with approbation.

Though the cases of these men were in substance the same, the charge against them varied in one particular. *Gregg's* indictment chargeth, that the letters were sent from the place where the *venue* is laid into parts beyond the seas (*IN partes transmarinas*) to be delivered to the enemy\*. *Henfey's*, with much greater propriety, and agreeably to the truth of the case, chargeth, that the letters were sent, from the place where the *venue* is laid, to be delivered in parts beyond the seas to the enemy. As the letters never went abroad this was undoubtedly the safer way of laying the charge.

Sect. 9.  
*Bellum Levatum,*  
though not  
*percussum.*  
Salk. 635.  
c St. Tri. 37.  
Vaughan's case.

The same case.

SECT. 9. An assembly armed and arrayed in a warlike manner for any treasonable purpose is *bellum levatum*, though not *bellum percussum*. Lifting and marching are sufficient overt-acts without coming to a battle or action. So cruising on the King's subjects under a *French* commission, *France* being then at war with us, was holden to be adhering to the King's enemies, though no other act of hostility was laid or proved.

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\* *Gregg* pleaded guilty to his indictment and was executed. See some account of him in *Burnet's Memoirs* 2d vol. p. 497. (10 St. Tri. Append. 77.)

SECT.



SECT. 10. Attacking the King's forces *in opposition to his authority* upon a march or in quarters is levying war against the King. But if upon a sudden quarrel, from some affront given or taken, the neighbourhood should rise and drive the forces out of their quarters, that would be a great misdemeanor, and if death should ensue it may be felony in the assailants; but it will not be treason, because there was no intention against the King's person or government.

CHAP. II.  
Sect. 10.  
Attacking the  
King's forces.  
(1 Hale 246.)

SECT. 11. Holding a castle or fort against the King or his forces, if *actual force be used in order to keep possession*, is levying war. But a bare detainer, as suppose by shutting the gates against the king or his forces, without any other force from within, Lord *Hale* conceiveth, will not amount to treason: but if this be done in *confederacy with enemies* or rebels, that circumstance will make it treason; in the one case under the clause of adhering to the King's enemies, in the other under that of levying war. So if a person having the custody of a castle or fort deliver it up to the rebels or enemies, *by treachery and in combination with them*, this is high treason within the act: in the former case it is levying war, in the latter it is adhering to the King's enemies. But mere cowardice or imprudence, though it might subject a commander in such case to death by the martial law, will not amount to treason.

Sect. 11.  
Holding a  
castle or fort.

1 Hale 146,  
296.

1 Hale 168,  
169.

SECT. 12. States in actual hostility with us, though no war be solemnly declared, are enemies within the meaning of the act: and therefore in an indictment on the clause of adhering to the King's enemies it is sufficient to aver, that the prince or state adhered to *is an enemy*, without shewing any war proclaimed; and the *fact*, whether war or not, is triable by the jury; and publick notoriety is sufficient evidence of the fact. And if the subject of a foreign prince in amity with us invadeth the kingdom without commission from his Sovereign, he is an enemy; and a subject of *England* adhering to him is a traitor within this clause of the act. Or if an alien *acteth*

Sect. 12.  
A state may be  
at war with us,  
though no war  
be declared.  
(1 Hale 162—  
164.)

## CHAP. II.

5 St. Tri.  
Vaughan's case  
Salk. 635.

acteth in an hostile manner against us under a commission from a prince or state at enmity with us, he is an enemy within the act; and adhering to him is treason within this clause.

5 St. Tri.  
Vaughan's case

So if a subject of *England* maketh actual war on the King's allies engaged with him against the common enemy, as was the case of the States-general in our wars against *France* in the time of King *William* and the late Queen, this is adhering to the King's enemies, though no act of hostility is committed against the King or his forces: for by this the common enemy is strengthened, and the King's hands are weakened.

## SECT. 13.

An overt act  
must be  
charged and  
proved.  
5 St. Tri. 21, 22.  
Vaughan's case.  
Salk. 634, S. C.  
Kel. 20.  
See chap. I. f. 1.

In prosecutions for these treasons, as well as for that of compassing the death of the King, an overt act of the treason must, as I have already observed, be charged in the indictment and proved. This rule is grounded on the words of the statute, which being a declaratory act must be strictly pursued. The words to this purpose are, "When a man doth compass &c.—or if a man doth levy war against our Lord the King in his realm, or be adherent to the King's enemies in his realm giving to them aid or comfort in the realm or elsewhere, and thereof be [*provablement*, i. e. upon full proof] attainted of open deed." And therefore it will not be sufficient to alledge generally, that the defendants did levy war or adhere: but in the former case it must be alledged, that they did assemble with a multitude armed and arrayed in a warlike manner and levied war; and in the latter, acts of adherence must be set forth.

2 Vent. 316.  
and Vaughan's  
case.

But the particular facts done by the defendants or a detail of the evidence intended to be given need not to be set forth in either case. The common-law, as I have already said upon a like occasion, never required this exactness; and the statute of King *William* doth not make it necessary to charge particular facts, where it was not necessary before. This was agreed by the judges at a conference on the cases of *Damaree* and *Purchase* before cited. MSS. *Tracy* and *Denton*. And in the cases of *Benstead*, and *Messenger*, and *Vaughan* before cited, and of the persons concerned in the rebellions of 1715 and 1745, it was not thought necessary.

P. 194.

7 W. III. c. 3.

CHAP.

## C H A P. III.

## CHAP. III.

Touching the Act of the 7 *William* III. c. 3.  
for regulating trials in Cases of Treason and  
Misprision of Treason.

**B**ISHOP *Burnet* informeth us, that this act passed after a long struggle, contrary to the hopes and expectation of the persons then at the head of affairs. "The design of it," he saith, "seemed to be to make men as safe in all treason-able practices as possible." This is a grievous imputation on the persons who forwarded the bill in either House of Parliament, and might have been spared: but I believe it was the language of many, and the opinion of some of the party with which the bishop stood connected.

*Burnet* Vol. II.  
141, 143, 161.

Had the bill required two witnesses to the same fact at the same time, as his Lordship saith it did, it would indeed have rendered men very secure in treasonable practices: but then it will be difficult to reconcile this to what he saith in a few lines afterwards; for after setting forth the substance of some of the principal clauses, particularly that relating to two witnesses to the same fact at the same time, he addeth, "All these things were in *themselves just and reasonable*: and if they had been moved by *other men* and at *another time*, they would have met with little opposition."

The bill did not come to the royal assent during the session it was brought into Parliament: for the clause which requireth that all the peers shall be summoned upon a trial of a peer for treason or misprision of treason, a provision founded in sound sense and strict justice, was added by the Lords, and the bill with that amendment sent back to the Commons, who disagreed to the amendment; and so the bill dropped for that session.

In a subsequent session the Commons sent up their own bill again, and the Lords added their clause, "which," saith the historian, "was not easily carried; for those who wished well to the bill looked on this as a device to lose it, as no doubt

## CHAP. III.

AN. 1695.  
 Kennet's Hist.  
 3d Vol. 699,  
 701.

"*doubt it was*; and therefore they opposed it: but, contrary to the hopes of the court, the Commons were so desirous of the bill, that when it came down to them they agreed to the clause; and so the bill passed and had the royal assent."

Some reflections might be made upon the spirit of faction, which possessed both sides, in this competition of parties; but I forbear, and proceed to offer a few observations on the several parts of the act.

SECT. 1.  
 The treasons  
 within the act.

SECT. I. My first inquiry will be, what treasons are within the act, and how the law standeth with regard to those which are not. By the general tenor of the act it extendeth to such high treasons *only*, "whereby any corruption of blood may or shall be made to the offender or his heirs, and to the misprision of such treasons."

The first and second sections are expressly confined to those treasons, and the misprision of them; and all the other clauses, except those relating to the trial of peers, and to the rejection of evidence of overt acts not laid in the indictment, use words of plain reference to the treasons mentioned in the first and second sections; and the 13th section expressly excludeth the treasons of counterfeiting his Majesty's coin \*, the great seal, privy seal, sign manual and privy signet.

The case of petty treason therefore standeth upon the foot it did before this act, and so do the treasons which are expressly excluded: and all the treasons created by acts saving the corruption of blood stand likewise on the same foot.

The statutes saving the blood are, 5 *Eliz. c. 1. f. 10, 11, 12.* concerning the papal supremacy: 5 *Eliz. c. 11. 18 Eliz. c. 1. 8 & 9 W. III. c. 25.* and 15 & 16 *Geo. II. c. 28.* touching the coin. I do not recollect any more of that kind.

SECT. 2.  
 Corruption of  
 blood saved.

SECT. 2. Having mentioned these acts saving the corruption of blood, I will take notice of a remarkable difference in the wording of them, though something foreign to the present inquiry. They all agree in saving the blood, but the acts

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(\* See *Gubogon's case* in *Leach 39.*)

of Queen *Eliz.* go farther and provide, That no forfeiture of lands shall be *but during the life of the offender.* These words are omitted in the act of King *William* and in that of his present Majesty; and therefore, with regard to the treasons created by these acts, the lands of the offender will be forfeited to the Crown, though the blood of the heir remaineth uncorrupted.

In the case of felony, a bare saving of the corruption of blood preserveth the descent to the heir; because in that case the Lord of the fee becometh intitled by way of mere escheat, *propter defectum sanguinis*; and consequently while the blood of the heir remaineth uncorrupted there can be no escheat. But in the case of high treason the forfeiture, sometimes, but improperly, called the *Royal Escheat*, accrueth to the Crown of whomsoever the land is holden, *propter delictum tenentis*: and doubtless the offence is not purged by such saving clause, though the blood of the heir is saved.

(See 1 Hale 253.  
Wright 117.)

This distinction was taken in a cause in the Exchequer in May 1709, between *Kirton* (a trustee for Baron *Lovell*) and *Horton* and others. One *Horton* had a lease to him and his heirs during three lives, and was attainted for one of the treasons touching the coin created by the 8th and 9th of King *William*. Baron *Lovell* got a grant from the Crown of this lease. It was holden by *Ward* and *Bury*, *Price* dissenting, that this lease was forfeited to the Crown, and decreed accordingly: and in January 1709 the decree was affirmed in Parliament, by advice of all the justices of both benches, except *Holt*, who was absent, and *Powell*, who dissented. *Trevor* and *Tracy* held, that there is no difference between such a lease and an estate of inheritance; for the heir under such a lease taketh by descent; to which *Powell* agreed: but most of the judges confined themselves to the case of a freehold lease; and would not give any opinion with regard to an estate of inheritance.

MS. Tracy, and  
Salk. 85.

SECT. 3. A question may possibly be made, Whether the benefit of this act is to be extended to all treasons working corruption of blood created by *subsequent acts*, wherein the benefit

SECT. 3.  
Ought the act  
to be extended  
to all future  
treasons cor-  
rupting the  
blood?

CHAP. III.  
9 W. III. c. 1.  
3 & 4 An.  
c. 14.

benefit of the act is not saved by special proviso; because the legislature, which is presumed to do nothing in vain, hath in some instances made express provision for that purpose. I should not have mentioned this as a matter of doubt, if Lord \* *Hale* had not in a similar case, I mean touching the extent of the statutes of E. VI, entertained a doubt grounded on the same presumption. For my part, I think the benefit of the act ought to be extended to prosecutions for all manner of high treasons, *working corruption of blood* and not within the exceptions, though created by acts subsequent to it. The words of the act take in every possible case, "*All and every person and persons that shall be accused and indicted for high treason;*" and the principles and views upon which the legislature proceeded, as they are set forth in the preamble, will govern every future case under the like circumstances; and the known rules of construction oblige us to construe an act so beneficial, as liberally as may be; that is, to extend it as far as the letter, and especially the visible scope and intention of it will warrant us.

Arguments founded on a general presumption of the wisdom and circumspection of the legislature always will and ought to have their weight. It hath been said, and many times with great propriety, that the making special provision in certain cases by statute implieth, that the law had not before provided for those cases; *for the Parliament doth nothing in vain*. This is a good general rule, but it is very well known not to be universally true. But admitting it to be so, yet many valuable purposes, which wisdom and a just concern for the publick welfare will suggest, may be answered by an express provision, not in itself of absolute indispensable necessity: sometimes for removing doubts where different opinions have been entertained; and at other times out of abundant caution for obviating doubts which possibly may arise. The instances of both kinds are numerous and need not to be mentioned in this place. One I will mention, because it cometh very near to the present case, and naturally falleth into a discourse concerning trials in case of high treason.

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\* See 1 *Hale* 297, 324. 2 *Hale* 287, 288. The learned author speaketh with great uncertainty, upon the question.

The privilege of Peerage in these cases is a right as universally known, and as well established, as any right can possibly be. It is a constitutional right recognized by *magna charta*: and yet we find special savings of the right of Peerage in many of the acts of Parliament creating new treasons about the time of the reformation, and down to the reign of *James* the first; though many of those acts had before declared, that the offenders being convicted, *according to due course of law*, shall suffer and forfeit &c; which rendered an express provision saving the rights of Peerage quite needless.

These savings might possibly be inserted out of abundant caution, lest it should be argued, (there were, I doubt, in those days tools of power capable of arguing,) that the privilege, being founded on immemorial usage, could not take place with regard to treasons created within time of memory. They might, I say, possibly be inserted to obviate that doubt: and with better colour of law and reason, they might be inserted in the Statutes for the trial of treasons committed in foreign parts or on the high seas; in order to take the case of Peers out of the general words, by which new jurisdictions, unknown to the law, with power to hear and determine such offences, were created. But even in these cases the saving was, in my opinion, quite unnecessary, unless by way of abundant caution, though I confess *Stanford* in the passage last referred to in the margin thinketh otherwise; for constitutional fundamental rights will not be abrogated by general words in statutes made for special purposes.

It is plain, that the legislature in succeeding times thought the saving clause unnecessary in any case whatsoever; for it is not inserted in one act now in force creating a new treason, since the revolution\*, though in some of them provision is made for the trial of such treasons *in any county within the kingdom*, if perpetrated in foreign parts; and in the clause inserted in the 7th of Queen *Anne* for the trial of foreign trea-

9W. III. c. 1.  
13 & 14 W. III.  
c. 3. 3 & 4 A.  
c. 14. 17 G. II.  
c. 39.  
7 A. c. 21. f. 5.

\* The temporary acts against mutiny and desertion made in Queen *Anne's* time have clauses saving the rights of peerage with regard to the offences made treason or felony by those acts; and also for giving the benefit of the 7th of King *William* to all persons upon trials for such treasons.

## CHAP. III.

28 H. VIII.

c. 15.

35 H. VIII.

c. 2.

sons and treasons committed on the high seas in the court of justiciary in *Scotland* or by special commission, in conformity to the statutes of *H. VIII.* made for that purpose, there is no saving of the right of Peerage: but had the saving been judged absolutely necessary it would have been inserted in every act creating a new treason, and above all in that I last mentioned; and likewise in every act creating a new felony; for new felonies and new treasons stand in this respect upon the same foot.

By parity of reason I conclude, that if the legislature had thought it of *absolute necessity* to save to the subject by special proviso the benefit of the act now under consideration, such proviso would have been inserted in every statute creating new treasons since that time: but the acts of the 9 *W.* and 3 & 4 *Anne* before referred to are the only acts now in force wherein I find it to have been done.

## Sect. 4.

It extends to  
treasons on the  
high seas.

SECT. 4. When I say that the statute extendeth to such high treasons *only* which work a corruption of blood, I would be understood to mean such treasons where the corruption of blood is *not saved by statute*: for if high treason ordinarily working corruption of blood, (as all high treason doth where the blood is not saved by special proviso,) if such treason be committed on the high seas, the defendant in a proceeding directed by the statute of *H. VIII.* will be intitled to the full benefit of this act, notwithstanding it hath been doubted, I think without just grounds, whether a corruption of blood is wrought in that proceeding.

28 H. VIII.

c. 15.

Salk. 85. 1 Hale  
354, 355.

## Sect. 5.

Ought it to be  
extended to  
offences con-  
cerning coin,  
which are not  
within the ex-  
ception in the  
act?

SECT. 5. Before I conclude this inquiry touching the extent of the statute, I will just mention the offences of importing money counterfeit to the similitude of *English* coin, counterfeiting foreign coin legitimated by proclamation, and of importing such coin. These treasons work a corruption of blood; and as such are brought within the general purview of the act; and do not come within the *letter* of the exception; which, in the case of coin, mentions only the offence of *counterfeiting* his Majesty's coin. Whether this beneficial law  
shall



shall be extended to these treasons, or whether by the rule of congruity they shall stand upon the same foot with the offence of counterfeiting the coin of the kingdom, as in some cases all treasons concerning the coin do,—these questions will be very fit to be considered whenever the cases shall happen, which probably will not be very soon.

For prosecutions for the first of these offences have been very rare: and for the others there can be none, as things stand at present, till the Crown shall be advised to legitimate some species of foreign coin. I know of none now current among us that is legitimated, and most probably none will be; for if the offences of counterfeiting and diminishing foreign coin and of importing such counterfeit and diminished coin, which are great evils, and daily growing, were made more penal than they are at present, I know of no good end that could be answered by legitimating any species of it; on the other hand, I foresee great inconveniences which would attend it.

As to the treasons which are not within the act, I shall be very short in this place. Petty treason is intitled to the benefit of the acts of the 1st and 5th of *E. VI.* as far as concerns the point of evidence; and by 1 & 2 *Pb.* and *M.* it is intitled to a trial according to the due course and order of common-law. The treason created by the 5th of *Eliz.* already mentioned standeth in both these respects upon the same foot.

Treasons not within the act.

c. 10.

c. 1.

The other treasons not comprehended in the general words or excepted, relating to the coin and the seals &c, are likewise intitled to a trial according to the due course and order of the common-law, and to all the advantages incident to that method of trial, which will be hereafter more particularly mentioned.

I now proceed to the other parts of the act.

I shall not consider the several clauses in the order they stand, but, as far as I can, I will range them under the following heads; what privileges the prisoner is intitled to, and what is incumbent on him, *previous* to the trial, and what *during* the trial. The clauses which do not fall under these heads will be last considered.

## CHAP. III

Sect. 6.  
Copy of the in-  
dictment.

SECT. 6. The prisoner is to have a copy of the whole indictment, but not of the witnesses' names, five days at least before the trial, in order to enable him to advise with counsel thereupon, to plead and make his defence; his attorney, or agent, or any person on his behalf requiring the same, and paying reasonable fees for the writing thereof, not exceeding 5 s. for the copy of any one indictment. (*Sect. 1.*)

Counsel to be  
assigned.

And if he desireth counsel, the court where he is to be tried, or any judge thereof, shall immediately upon request assign him such and so many counsel, not exceeding two, as he shall desire: and such counsel shall have free access to him at all seasonable hours. (*Ibid.*)

Panel of the  
jurors.

He shall likewise have a copy of the panel of the jurors, who are to try him, duly returned by the sheriff, and delivered to him two days at least before his trial: and he shall have the like process to compel his witnesses to appear for him at the trial, as is usually granted to compel witnesses to appear against prisoners in the like case. (*Sect. 7.*)

7 An. c. 21.

The 7th of the late Queen, whenever it shall fully take effect, will make some material alterations in the law touching copies of the indictment and panel; and therefore before I conclude some notice shall be taken of it.

4 St. Tri. 411  
to 414.

At common-law no prisoner in capital cases was intitled to a copy of the indictment or panel, or of any of the proceedings against him. Many persons, it is true, have upon their arraignment insisted on a copy of the whole indictment, but it hath been constantly denied. It was denied in the case of Lord *Preston* and the two other gentlemen indicted with him, by the unanimous opinion of the judges present, who declared that it never had been granted, though frequently demanded. And Lord *Preston* having said that it was granted to Lord *Russel*, *Holt* told him that he and some others of the judges present, who were of counsel for that Lord, did not advise him to demand it; "For, saith he, we knew he could not have it by "law." Lord *Preston*, not satisfied with this answer, prayed that counsel might be assigned him to argue that point; which  
the

the court unanimously refused, it being, they said, *a point that would not bear a debate.*

CHAP. III.

The statute of the 46 E. III, which had been formerly insisted upon by prisoners in the like case, was much pressed in this. It is not in print among the Statutes, but an attested copy from the roll was read at the prisoner's request, and is printed in the trial. It plainly relateth to such records in which the subject may be interested, as *matters of evidence upon questions of private right*: and it enacteth, "That all persons shall for the future have free access to them, and may have *exemplifications* of them whether they make for or against the King." This was the opinion of the whole court.

In the case of *Charnock, King, and Keys*, whose trials came on after the passing this act and about a fortnight before it took place, they were denied a copy of their indictment; though they argued with a great deal of plausibility, that they were within the reason and equity of the act at that time, as much as they would have been if their trials had been brought on a fortnight later. Ibid. 551, 552.

In these cases, and in the case of the assassines, whose trials came on before the commencement of the act, the prisoners, as soon as they had pleaded, had copies of the panels delivered to them; and their trials were postponed, that they might be better enabled to conduct themselves with regard to their challenges. But this the court declared to be matter of favour, and not of right: and counsel and solicitors were permitted to attend them in prison previous to their trials. This likewise was an indulgence, which they could not claim of *strict* right, and which in bad times hath been generally denied.

It will not, I hope, be thought superfluous to have shortly stated how these matters stood at common-law; since all high treasons not within the act, and all felonies, in which I include petit treason, stand in these respects upon the foot of common-law.

Though the act mentioneth only the copy of the indictment, yet the prisoner ought to have a copy of the *caption* delivered to him with the indictment; for this in many cases is as necessary to enable him to conduct himself in pleading, as the other. This is now the constant practice.

Copy of the caption of the indictment.  
4 St. Tri. 656, 734.

## CHAP. III.

Ibid.

But if the prisoner pleadeth without a copy of the *captium*, as some of the assassines did, he is too late to make that objection, or indeed any other objection that turneth upon a defect in the copy; for by pleading he admitteth, that he hath had a copy *sufficient for the purposes intended by the act*.

4 St. Tri.  
Rookwood.  
Lowick.  
Cranburn.

By the letter of the act the copy is to be delivered five days before the trial. But upon the true construction of it, the copy after the bill is found, for till then it is no indictment, ought to be delivered five days before the day of arraignment, for that is the prisoner's time for pleading: and the five days must be exclusive of the day of delivery and the day of arraignment\*. So with regard to the copy of the panel, the two days must be exclusive of the day of delivery and the day of trial. These points have been long settled, and are now matters of constant practice.

4 St. Tri. 651  
to 655, 658.

Though the words of the statute are, that the prisoner shall have a copy of the panel *duly returned by the sheriff*, yet if the copy should happen to be delivered before the return of the precept, which upon a bare commission of oyer and terminer is commonly made returnable on the day intended for the trial, it will be sufficient; for it satisfieth the words of the statute and answereth all the ends of it.

But V. 7 An.  
c. 21. inf. 249.  
(See 9 St. Tri.  
680.)

The little tract intitled, "The Method of Trial of Commissioners in Cases of High Treason," published in the year 1709 by order of the House of Lords, directeth, that the additions of dwelling-places and professions of the jurors be inserted in the copy of the panel; but the act doth not require that exactness, and the practice is otherwise.

Exceptions to  
the indictment.

If the prisoner would avail himself of any defect in the indictment by miswriting, misspelling, false or improper Latin, he must take his exceptions, *before evidence given*, in open court: these are the words of the act. (Sect. 9.)

F. 7, 2.

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\* Upon the commissions which sat in *Surry* and in the north for the trial of the rebels in the year 1746, the five days, as I have already said, were likewise exclusive of an intervening *Sunday*, that not being thought a proper day for the prisoner's advising with his counsel or preparing for his defence. It was so ordered upon a like commission in the north in the year 1716 for greater caution and to obviate all objections. But the statute doth not require it.

But

But though the act is thus worded, the construction of it hath been, that exceptions grounded on those mistakes must be taken *before plea pleaded*: and in the cases of Captain *Vaughan* already cited, and of one *Sullivan* at the *Old Bailey* *October 1715*, and of Mr. *Layer*, the court refused to hear such exceptions after plea. It is true, that in *Cranburn's* case the court did permit his counsel to take those exceptions after plea, and in *Rookwood's* after the jury was sworn: but it ought to be remembered, that these were indulgences to the prisoners upon a new act, and before the practice was settled to the contrary, as it now is.

5 St. Tri.  
MSS. Chapple  
and Denton.  
6 St. Tri.  
4 St. Tri.

I come now to the privileges the prisoner is intitled to during the time of his trial.

SECT. 7. He is to have the assistance of his counsel throughout his trial, to examine his witnesses, who are to be upon oath \*, and to conduct his whole defence as well in point of fact as upon questions of law. (*Sect. 1.*)

Sect. 7.  
Counsel to con-  
duct the whole  
defence.

At common-law no counsel was allowed upon the issue of guilty or not guilty in any capital case whatsoever, except upon questions of law; and then only in doubtful, not in plain cases. I am far from disputing the propriety of this rule while it is confined to felony and the lower class of treasons concerning the coin and the seals. I know many things have been thrown out upon this subject, and inconveniences, some real, some imaginary, have been suggested by popular writers, who seem to have attended singly to those on one side of the question: but it is impossible in a state of imperfection to keep clear of all inconveniences, though wisdom will always direct us to the course which is subject to the fewest and the least; and this is the utmost that human wisdom can do.

In state-prosecutions, which are the objects of this act, and are carried on by the weight of the Crown and too often in the spirit of party, and are generally conducted by gentlemen of high rank at the bar, it is extremely reasonable to allow the prisoner the assistance of counsel, to the full extent of the act. But this the common-law did not allow. Accordingly it was refused to every person concerned in the assassination-

\* *N. B.* By 1 *An. c.* 9. the witnesses for the prisoner are to be upon oath in all cases of treason or felony,

CHAP. III. plot, whose trials came on *after this act had passed the royal assent, but before the commencement of it*: and in Sir William Parkins's case, the very day before the act took place, Holt said upon the occasion, "*We must conform to the law as it is at present, not to what it will be to-morrow; We are upon our oaths so to do.*" Counsel, as to matters of fact, was likewise denied to Lord Winton, and to Lord Lovat, being in the case of an impeachment, which is excepted\* out of the act. But all the prisoners I have mentioned had, through the benignity of the times, counsel to attend them in prison previous to their trials.

4 St. Tri. 618,  
619.

Str. 824,  
P. 46.

See the Report,  
56.

19 G. II. c. 34.

SECT. 8.  
Evidence,

Upon the trial of issues which do not turn upon the question of guilty or not guilty, but upon collateral facts, prisoners under a capital charge, whether for treason or felony, always were intitled to the full assistance of counsel. *Humphry Stafford* in the 1st of Hen. VII. had counsel on his plea of sanctuary. *Roger Johnson*, whose case is before reported, had counsel on the error in fact assigned by him for reversing his outlawry, though in a case concerning the coin: and so had *John Harvey*, and every prisoner in the like case with him, upon the issue taken upon the several matters alledged in the suggestion filed on the part of the Crown, pursuant to the act of the 19th of the King.

SECT. 8. I come now to the head of evidence, which divideth itself into two branches; *What number of witnesses doth the act require, and what matters may be given in evidence*; and though I have postponed the consideration of this part of the act to this place, yet whatever will be said with regard to the evidence *at the trial* must be applied to the evidence which shall be given *on the indictment*.

1 E. VI. c. 12.  
& 5 E. VI. c. 11.  
and 1 & 2 Ph.  
& M. c. 10.

I know a difference hath been taken in the construction of the statutes of *E. VI.* and of *Ph.* and *Ma.* between the indictment and the trial: but this distinction is entirely without foundation even upon the foot of those statutes. But the present act

C. 30.

\* By the 10th of his present Majesty counsel is allowed in the case of an impeachment; and with great reason, since the defendant is struggling under the whole weight of the Commons of Great Britain,

hath

hath not left room for that distinction. It enacteth, "That  
 " no person shall be *indicted*, tried, or attainted of high treason,  
 " whereby any corruption of blood may be made to the offen-  
 " der or his heirs or of misprision of such treason, but upon  
 " the oaths of two lawful witnesses; either both to the same  
 " overt act, or one of them to one and the other of them to  
 " another overt act of the *same treason*; unless he shall wil-  
 " lingly without violence in *open court* confess the same, or  
 " shall stand mute, or refuse to plead, or in cases of high trea-  
 " son shall peremptorily challenge above the number of 35 of  
 " the jury." ( *Sect. 2.*)

" Provided that any person, being indicted as aforesaid for  
 " any of the said treasons or misprisions, may be outlawed and  
 " thereby attainted: and in cases of the high treasons afore-  
 " said, where by the law, after such outlawry, the party out-  
 " lawed may come in and be tried, he shall upon such trial have  
 " the benefit of this act." ( *Sect. 3.*)

And it farther enacteth and declareth, " That if two or  
 " more distinct treasons of divers heads or kinds shall be al-  
 " ledged in one bill of indictment, one witness to one of the  
 " said treasons and another witness to another of the said trea-  
 " sons shall not be deemed two witnesses to the same treason  
 " within the meaning of the act." ( *Sect. 4.*)

It hath been generally agreed, and, I think, upon just grounds,  
 (though Lord *Coke* hath advanced a contrary doctrine,) that at <sup>3 Infl. 26.</sup>  
 common-law one witness was sufficient in the case of treason as  
 well as in every other capital case. The only difficulty hath  
 been upon the construction of the statute of *Ph. and Ma.*,  
 whether that act hath repealed the statutes of *Ed. VI. as far as*  
*they make two witnesses necessary in all cases of treason.*

It may possibly be judged needless at this time to enter far  
 into this inquiry: but since the statutes of *E. VI.* plainly ex-  
 tend to petit treason, and the act now under consideration as  
 plainly doth not, it will not be time altogether mispent to clear  
 up this point; for petit treason standeth in this respect singly  
 on the foot of the statutes of *Ed. VI.*

I do

CHAP. III.

Dy. 99, 100.

¶ St. Tri.

I do not find upon looking over the State Trials\*, that in Crown-prosecutions any great regard was paid to the acts of E. VI. for near a century after they were passed; or indeed to the common well-known rules of legal evidence; though the authors who wrote in those days do sometimes speak of the acts as then in force. In the case of *William Thomas*, when they were undoubtedly in force, they were rendered quite nugatory by this very extraordinary resolution, that *one witness of his own knowledge, and another by hearsay FROM HIM*, though AT THE THIRD OR FOURTH HAND, made two witnesses or accusers within the acts: and in the case of *Sir Nicholas Throckmorton*, which came to trial the same term†, no sort of regard was paid to them; for though the prisoner strongly insisted on the benefit of them, particularly of that which requireth the witnesses to be brought face to face upon the trial, the counsel for the Crown went on in the method formerly practised, reading examinations and confessions of persons supposed to be accomplices, some *living and amefneable*, others *lately hanged for the same treason*.

In many of the succeeding trials the prisoners were told, that the statutes of *Edw. VI. were repealed*, particularly that which required two witnesses face to face; that this law had been found dangerous to the Crown; that witnesses may be prevailed upon to unsay in court what they have said upon their examinations; that the confessions of persons accusing themselves are the strongest of all evidence against their accomplices; that their partners in guilt are the *gens de leur condition* the statute of treasons ‡ speaketh of; and that confessions, though not signed by the party, are of equal weight with those which are signed. This every man, who will do so much penance as to read over the State-trials during the reigns of *Queen Eliz.* and *King James*, will find to have been the doctrine and practice of the times: and I do not see, that the case of *Sir Walter Raleigh*, whose trial, having been long since printed and prefixed to his history, hath been more generally

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\* See the State Trials from the 1st of *Queen Mary* to the restoration.

† These cases came on in *Easter Term* 1 *Mar.* and the Parliament of the 1st and 2d *Ph. and M.* did not meet till *November* following.

‡ The words of the statute are, *Et de ceo soit provablement atteint—par gens de leur condition*; meaning plainly the *judicium parium* required by *magna charta*. (See 3 *Inst.* 14.)



read and censured than others,—I do not see, that that case, always  
 excepting the extraordinary behaviour of the King's attorney, CHAP. III.  
 did in point of hardship differ from many of the former. Coke.

In succeeding times, when people of all ranks and parties  
 had in their turn been learning moderation in the school of ad-  
 versity, light began to dawn upon us. Lord *Coke*, after his 3 Inst. 24 to 27.  
 disgrace at court had given him leisure for cool reflection, was  
 of opinion, that the statutes of *Ed. VI.* touching evidence are  
 not repealed by 1 & 2 *Ph. & Ma.*; that two witnesses are still  
 required in cases of treason, not barely upon the indictment,  
 which he stateth as an opinion entertained by some, but also  
 upon the trial. This, as far as I can collect from the passage  
 I have cited, was the result of all his searches into this matter;  
 though he doth not in every part of the passage express himself  
 with that light and precision which the importance of the sub-  
 ject required.

In the case of *Mr. Love, Hale*, who was counsel for him, in-  
 sisted, that two witnesses are necessary upon the trial in case of  
 treason, upon the foot of the statutes of *Edw. VI.*, *not repealed*, 2 St. Tri. 144,  
171 to 173, and  
177.  
 he saith, *in point of testimony by the statute of Ph. & Ma.*; and  
 one of the counsel on the side of the prosecution, who upon Sir Tho. With-  
rington.  
 the whole argued with candour, admitted, that the statutes of  
*E. VI.* are not repealed by that of *Ph. & Ma.*, and that two  
 witnesses are still necessary; but insisted, that one witness to  
 one overt act, and another to another overt act of *the same spe-  
 cies of treason* are two sufficient witnesses within the acts. This  
 gentleman was the first I have met with who considered the point  
 in this light; in which, as I shall shew presently, it hath been  
 considered ever-since the restoration.

*Hale* in his summary is clear, that the statutes of *Ed. VI.* Sum. 162.  
 require two witnesses to the *petit jury* in the case of treason;  
 and this, saith he, standeth notwithstanding the statute of the  
 1 & 2 *Ph. & Ma.* But in his history of the Pleas of the  
 Crown he speaketh more doubtfully. He saith in one place, 1 Hale 296.  
 that it hath been *holden by many* that the statutes of *E. VI.*  
 are still in force notwithstanding 1 & 2 *Ph. & M.*: in another, 2 Hale 286.  
 that two witnesses are required upon the indictment, not upon  
 the

CHAP. III.  
1 Hale 298, to  
300.

*the trial*: in a third, after having said that it is agreed on all hands, that the statute of *Ph. & M.* taketh away the necessity of two witnesses on the trial, he proceedeth to consider the opinion of those who argued, that, the trial being the sole object of that statute, it did not take away the necessity of two witnesses on the indictment, since the indictment and trial are in their opinion two distinct things.

He then offereth many strong reasons, founded on great authority, against that distinction; and sheweth, that the indictment ought to be considered as inseparably incident to the trial and in truth a part of it; and concludeth thus, "And thus the reasons stand on both sides; and though these seem to be stronger than the former, yet in a case of this moment it is safest to hold that in practice which hath least doubt and danger, especially in cases of life." Thus far the learned judge appeareth to have been doubtful *at least*, to say no more. But in another passage speaking of informations in capital cases taken by magistrates upon oath, and in what cases and under what restrictions they may be read in evidence, he saith, "Though informations upon oath taken before a justice of the peace may make a good testimony to be read against the offender in case of felony, where the witness is not able to travel, yet in case of treason, where two witnesses are required, such an examination is not allowable; for the statute requires, that they [if living] be produced upon the arraignment in the presence of the prisoner, to the end that he may cross-examine them." The statute his Lordship mentioneth can be no other than the 5 & 6 E. VI. Some other passages I might have cited from the history of the Pleas of the Crown, where the learned author fluctuateth between two opposite opinions upon this point; but these are sufficient.

P. 9.

*Kelyng* reporteth, that, at a conference among the judges preparatory to the trial of the regicides, it was agreed, that the law requireth two witnesses in the case of treason; but that one witness to one overt act of compassing, (for compassing the King's death was the treason then under consideration,) and another witness to another act of compassing, make two witnesses of compassing. He afterwards speaketh

speaketh very doubtfully upon this point; and at length saith, that it seemed to him that at the common-law one witness was sufficient in treason, and that the 1 & 2 Ph. & M. c. 10. had repealed the statutes of E. VI.

CHAP. III.  
P. 18, 49.

At Lord *Stafford's* trial the necessity of two witnesses was treated as a point beyond all doubt. But his Lordship insisting that there ought to be two to *each overt act*, all the judges present delivered their opinions *seriatim*, and declared, that one witness to one overt act, and another to another overt act of the same species of treason, are two sufficient witnesses within the statutes: otherwise no government could be safe, if traitors had but craft equal to their villany. From that time the point hath been settled; and in the succeeding trials of that reign and the next, though many irregular things were done favouring of the times, this rule still kept its ground: and in all the trials after the revolution, before the act of the 7th of King *William* took place, it was strictly observed.

3 St. Tri. 204.  
(Sir T. Raym.  
407.)

4 St. Tri.

Having given this short history of the difficulty which hath been founded on the statute of *Ph. and M.*, I will take the liberty of offering my own thoughts upon it.

I conceive that the clause upon which the doubt arose, "That all trials for any treason shall be according to the due order and course of the common-law and not otherwise," was intended in favour of the subject, not in the least to his prejudice. It was founded in the same principle, and directed to the same salutary ends, which the statute made but the year before, reducing all treasons to the standard of the 25 *E. III.*, had in view. By the one the subject was secured in his journey through life against the numerous precipices which the heat and distemper of former times had opened in his way; and the other restored to him the benefit of a trial by a jury of the proper county, with all the advantages of defence peculiar to that method of trial, where former statutes had deprived him of it. This I apprehend was the sole intent of this clause, which will be better explained by what followeth.

By 32 *H. VIII.* treasons committed in *Wales*, or where the King's writ runneth not, were to be tried in such shires and by

c. 4

- CHAP. III. by such commissioners as the King should appoint. By 33d of  
 C. 20. that King persons committing treason, and confessing it, and  
 afterwards becoming lunatick, might be tried *without being  
 brought to answer*, by the like special commission in any county  
 the King should appoint: and by another act of the same year,  
 C. 23. persons accused of treason or misprision committed in *England  
 or elsewhere*, being examined by three of the privy council and  
 by them *vehemently suspected*, might be tried by special com-  
 mission in any county the King should appoint; and by the  
 same act, the peremptory challenge in all cases of treason and  
 misprision was absolutely taken away.

These acts were derogatory to *the due course and order of  
 the common-law*, and in many instances grievous to the subject.  
 The judges have therefore considered them all as repealed by  
 this general clause, so far as concerneth treasons committed in  
*England or Wales*. By this construction the trial by a jury of  
 the proper county with a peremptory challenge of 35, which  
 is with peculiar propriety called a trial according to *the due  
 course and order of the common-law*, is restored.

- 28 H. VIII. But the acts of the 28th and 35th of that reign for the trial  
 C. 15. of treasons committed on the high seas or out of the realm,  
 35 H. VIII. though they introduced a method of trial new in those cases  
 C. 2. and unknown to the common-law, have not been holden to be  
 repealed by this clause; nor is the 35 H. VIII. repealed as *far  
 as it concerneth treason in foreign parts*: for these acts deprive  
 the subject of no advantage for defence, to which he was before  
 intitled: on the contrary, instead of a trial according to the  
 course and order of the civil-law, they introduced a trial founded  
 in the wisdom and benignity of the common-law, with all the  
 advantages for defence incident to it; except only in the point  
 of locality, which the nature of the cases would not admit of.

But the privilege the subject is intitled to under the statutes  
 of E. VI. of having the charge proved by two lawful witnesses  
 and those brought face to face at the trial, a mighty safe-guard  
 against oppressive prosecutions, was never intended to be taken  
 away

away by this general clause; nor in truth did the legislature apprehend that it could be extended so far.

For by a subsequent clause \* in the same statute it is provided, "That in all cases of high treason concerning coin current within the realm, or for counterfeiting the King's or Queen's signet, privy seal, great seal, or sign manual, such manner of trial and none other be observed and kept as heretofore hath been used by the common-law of this realm, any law, statute, or other thing to the contrary notwithstanding." It will be extremely difficult to account for this clause, which is admitted on all hands to have taken away the necessity of two witnesses in the cases touching the coin and seals, if the former clause had done the same in all cases of treason whatsoever; the latter clause was certainly inserted to effect something which the former had not: but I think the next act maketh the matter very clear if any doubt remaineth on this. It enacteth, that in the case of offences therein enumerated touching the coin the offenders "may be indicted, tried, convicted, or attainted by *such-like evidence* and in such manner and form as hath been used and accustomed within this realm, at any time before the first year of our late sovereign Lord King E. VI." Here the matter of evidence, which appeareth to be the only point then in contemplation, is plainly expressed and extended by name to the trial as well as the indictment; and the very time when two witnesses first became necessary in both cases is pointed out.

1 & 2 P. & M.  
c. 11.

If the legislature did intend by the former act to take away the necessity of two witnesses in all cases of treason whatsoever, why did it not speak as plainly as it doth in this? And on the other hand, if it was conceived that this was done by the general words of the former act, why is it done in special cases in terms so express by this? The different penning of two clauses in one and the same act, and also of two acts depending at the same time and which probably passed the royal assent on the same day, convinceth me, that the legislature had in contemplation two different objects, distinct in their nature and tendency; and accordingly

\* See in *Rafal's Stat.* 1 & 2 Ph. and Ma. c. 10. f. 8. 13 both the clauses at large.

CHAP. III. made different provisions respectively suited to the nature of each.

I now return to the statute of King *William*.

Though it requireth two witnesses to each treason, yet a collateral fact, not tending to the proof of the overt acts, may be proved by one: for this statute confineth itself to the proof of the treason, *the proof of the overt acts*; and the statutes of *E. VI.* are confined to the evidence for proving the prisoner guilty of *the offences charged on him*, which likewise must be understood of overt acts.

4 St. Tri.  
Salk. 634.

This difference, between the proof of overt acts and of collateral facts, was taken by Lord *Holt* in the case of Captain *Vaughan*, who insisted and called witnesses to prove, that he was a subject of *France* born in the dominions of the *French* King. The counsel for the Crown called witnesses to prove, that he was born in *Ireland*: and his counsel insisting that there was but one credible witness to that fact, *Holt* said, "That is no overt act, if there be one witness to that it is enough; there need not be two witnesses to prove him a subject, but here are more." His confession was likewise given in evidence as to that fact; but it appearing, upon cross-examination, to have been made the night he was taken and when very drunk, and the fact of his birth in *Ireland* being absolutely denied by him the next morning upon his examination taken before a magistrate, little regard seems to have been paid to his confession.

The case of a confession made willingly and without violence is excepted in this act and in both the statutes of *E. VI.*: but there is a difference in the wording of these statutes, which I have thought did merit consideration so far as to warrant a different construction of them. The words of this act are, "unless the party shall willingly without violence *in open court* confess the same." The words *in open court* the statutes of *E. VI.* have omitted. These words seem to have been inserted in order to carry the necessity of two witnesses to the overt acts farther than the statutes of *E. VI.* were formerly thought to carry it: for the construction of these statutes hath been, that a confession upon an examination of the party, *taken out of court and before a magistrate*

\* Hale 304.  
Kiel. 18.  
The case of  
Tong and  
others.  
2 And. 67.

*magistrate or person having authority to take such examination,* proved upon the trial by two witnesses, is evidence of itself sufficient to convict, without farther proof of the overt acts; for, say the books, such confession *putteth the case out of the statute, it satisfieth the statute*: and by confession is not meant a confession before the judge upon the prisoner's arraignment, but upon his examination before a magistrate; for, saith Coke, <sup>3 Inst. 251</sup> the words, without violence, mean willingly *without any torture*, and the judge is never present at any torture, neither upon the prisoner's arraignment was ever any torture offered.

But in the year 1716 at a conference among the judges, preparatory to the trial of *Francis Francia*, at which the attorney and solicitor general, *who were to conduct the prosecution the next day*, lent their assistance, no regard seemeth to have been paid to the authorities I have cited; for it was then agreed, that upon the foot of those acts of E. VI. by confession is meant only a confession *upon the arraignment of the party, which*, it was said, *amounteth to a conviction*.

Upon the trial of *John Berwick* in 1746, this opinion, <sup>See p. 104</sup> which, I confess, I had never heard of before, though I believe some of the judges had seen it, was cited and much urged by the counsel for the Crown; and a MS. report of it was produced, of which I soon afterwards was favoured with a copy\*.

In the case of *Francis Willis* the counsel for the Crown <sup>8 St. Tri. 254, 255, 262, 263.</sup> called a witness to prove what the prisoner had said to him touching the share he had in the treason he then stood charged with. The prisoner's counsel objected to this sort of evidence, and insisted, that by this act no confession, except it be made in open court, shall be admitted in evidence: but the judges present were very clear, that such confession is evidence *admissible*, proper to be left to a jury, and *will go in corroboration of other evidence* to the overt acts; though it might be still a disputable point, whether a confession out of court, proved by two witnesses, is of itself *sufficient to convict*. Upon this last

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\* Evidence of a confession was holden sufficient by the learned judges who sat upon the commission in the north in the same summer, upon the authority of this opinion.

CHAP. III. point none of them, except Chief-Baron *Ward*, delivered any *direct* opinion: his words are, "A confession shall not supply the want of a witness, *there shall be two witnesses to the treason notwithstanding*; but to say it shall not be given in evidence, there is no ground for it." The attorney-general admitted, that two witnesses are necessary besides the confession. The solicitor is more explicit and saith, "He (the prisoner) shall not be convicted on a trial without two lawful witnesses, that is the thing provided for. It was to exclude a precedent that had been settled in *Tong's* case," (the case already cited from *Kelyng* and *Hale*,) "but it was not designed to exclude all confessions. That was evidence at law, and always must be so. The design of the act was to exclude confessions from having the force of a conviction, unless it were in a court of record; and to prevent a confession proved by two witnesses from being a sufficient ground for a conviction."

Sir James Montague.

Sir Robert Eyre.

MSS. Tracy and Denton.

In the argument in the case of *Willis*, the cases of *Vaughan*\* and of one *Smith alias May* were cited. *Vaughan's* case hath been already mentioned. The case of *Smith* was at an admiralty-session in *June 7 An.* upon an indictment for adhering to the Queen's enemies on the high seas. He made *Alienage* his defence, as *Vaughan* did; and his confession, that he was an *Englishman*-born was holden to be *admissible* evidence by *Trevor*, *Powell*, *Powis*, *Tracy* and *Bury*, though his counsel insisted on this act of the 7th of King *William*. In that case it was said by the court, that the 7th of King *William* was to prevent a confession being *conclusive* evidence of the *very overt act*, not to take away that sort of evidence of *collateral matters*; and *Vaughan's* case was cited and relied on.

In truth, with regard to all collateral facts not conducing to the proof of the overt acts, I think we may safely lay it down as a general rule, that whatever was evidence at common-law is still good evidence under the statute; which, as I said before, is confined to the proof of the overt acts.

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\* I think *Vaughan's* is the case cited in *Willis's* trial by the name of *Ball*.



The reader sees, that opinions have been various touching the sufficiency of this sort of evidence: but perhaps it may be now too late to controvert the authority of the opinion in 1716, warranted, as it hath been, by later precedents. All I insist on is, that the rule should never be carried farther than that case warranteth, never farther than to a confession made during the solemnity of an examination before a magistrate, or person having authority to take it; when the party may be presumed to be properly upon his guard, and apprized of the danger he standeth in. Which was an ingredient in the case of *Francia*, and of *Gregg* cited in the argument on *Francia's* case; and in all those already cited which came in judgment before the statute of King *William*.

For hasty confessions, made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured, words are often mis-reported, whether through ignorance, inattention, or malice, it mattereth not to the defendant, he is equally affected in either case; and they are extremely liable to mis-construction: and withal, this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence, by which the proof of plain facts may be and often is confronted.

The distinction I aim at between confessions made upon an examination of the party by a magistrate or person having authority to examine, and hasty unguarded declarations made in the hearing of persons having no such authority, may probably reconcile what fell from the court and the King's counsel in *Willis's* case already mentioned, with the opinion in *Francia's*; since, in the case of *Willis*, no examination was had before a magistrate or person having authority to examine, as there was in the other.

I would not in any thing I have said be understood to arraign the proceedings in the case of *Berwick* before mentioned. He was found in a prison assigned by the Duke, after the surrender, to the officers in the rebel-garrison, and to none but officers, whither he went with the rest of them. He appeared among them and took the rank of an officer. These facts, together with his declarations, all proved by two witnesses, were, I think, very properly considered by two judges

## CHAP. III.

judges not as a bare confession after the fact, but as an evidence upon the spot and in the very scene of action. And with regard to the proceedings in the North already mentioned, I doubt not the learned judges went upon good grounds; the circumstances of each case, which I am not apprized of, being duly considered.

Fortescue de  
Laudibus &c.  
c. 22.

3 Inst. 35.

The wording of these acts touching confessions, "unless the party shall willingly and *without violence* confess the same," suggesteth a matter which I will just mention. The common-law knew of no such engine of power as the rack or torture to furnish the crown with evidence out of the prisoner's mouth against himself or other people. It was, as Lord Coke informeth us, first brought into the tower by a great minister in the time of *H. VI.*, directly, saith he, *against law, and cannot be justified by any usage*: but in fact it was practised, though, I believe, sparingly, and never, saith King James\*, but in cases of high treason, for more than a century afterwards†.

This accounteth extremely well for inserting the words, *without violence*, in the statutes of *E. VI.* I cannot so easily account for them in that of King William.

Sec. 9.  
No evidence of  
any overt act  
not laid.

SECT. 9. This act in substance followeth the rule which had already taken place with regard to the necessity of two witnesses to the same treason, but it goeth farther; and, left the prisoner should be surpris'd or confounded by a multiplicity and variety of facts, which he is to answer upon the

\* St. Tri.  
\* Coke.

\* See K. James's premonition, edit. 1609, p. 130.

† At the trial of the Earls of *Essex* and *Souhampton*, the Attorney-general extolled the great clemency of her Majesty towards the conspirators, that none of them were put to the rack or torture; and acknowledgeth the goodness of God towards her, and his just judgment upon the prisoners, that the truth had been revealed by the witnesses *without rack or torture* of any of them.

A strain of adulation, to say no worse of it, nauseous and sordid, highly unbecoming a gentleman of the profession; especially one who well knew, and hath informed his readers, that any kind of torture in that case would have been utterly illegal.

Rushworth,  
Whitlock.

When Felton upon his examination at the council-board declared, as he had always done, that no man living had instigated him to the murder of the Duke of Buckingham or knew of his intention, the Bishop of London said to him, "If you will not confess you *must go to the rack*." The man replied, "If it must be so, I know not whom I may accuse in the extremity of the torture," Bishop Laud perhaps or any Lord at this board." Sound sense in the mouth of an enthusiast and a ruffian!

Laud having propos'd the rack, the matter was shortly debated at the board, and it ended in a reference to the judges; who unanimously resolv'd that the rack cannot be legally used.

spot,

spot, it enacteth, " That no evidence shall be admitted or CHAP. III.  
 " given of any overt act that is not expressly laid in the indict-  
 " ment against any person or persons whatsoever." (*Stat. 8.*)

The sense of this clause I take to be, that no overt act amounting to a *distinct independent charge*, though falling under the same head of treason, shall be given in evidence, unless it be expressly laid in the indictment; but still, if it amounteth to a direct proof of any of the overt acts which are laid, it may be given in evidence of such overt acts.

In the case of *Ambrose Rookwood*, who was indicted for 4 St. Tri.  
 compassing the death of the King, two of the overt acts charged were, that he and others met and consulted the proper means for way-laying the King, and attacking him in his coach; and also that they agreed to provide forty men for that purpose. The counsel for the Crown offered to give evidence, that the prisoner produced to one of the conspirators a list of the names of a small party which was to join in the attempt, and of which he was to have the command, with his own name at the head of the list as their commander. This evidence was opposed by the prisoner's counsel, because that circumstance was not charged in the indictment; and this clause of the act was much pressed: but the court said, that this circumstance, if proved, amounting to a direct proof of the overt acts which were laid, *viz.* the meeting and consulting how to kill the King, and their agreeing to provide forty men for that purpose, and falling under the same species of treason, was very proper to be given in evidence; and in Major *Lowick's* case Ibid.  
 they declared, that if the circumstance of providing forty men had not been laid, it might notwithstanding have been given in evidence, for it was a direct proof of the first overt act, *viz.* the meeting and consulting the proper means to kill the King.

The same rule was laid down in the case of Mr. *Laver*. His 6 St. Tri.  
 corresponding with the pretender, though not laid, and though made treason by the 12th and 13th of King *William*, was given in evidence; for it directly tended to prove one overt act that was laid, *viz.* his conspiring to depose the King

CHAP. III.  
My Report, 9,  
22.

and to place the pretender on the throne. The like rule was given in the cases of *Deacon* and Sir *John Wedderburn* upon the special commission in *Surry* 1746.

§ St. Tri.

On the other hand, in the case of Captain *Vaughan*, upon an indictment for adhering to the King's enemies on the high sea, the overt act laid was his cruizing on the King's subjects in a vessel called the *Loyal Clencarty*: the counsel for the Crown offered evidence to prove, that he had, some time before, cut away the custom-house barge, and had gone a-cruizing in *her*. This evidence was opposed by the prisoner's counsel, and, after some debate, rejected by the court: for, were it true, it was no sort of proof, that the prisoner had cruized in the *Loyal Clencarty*; which was the only fact he was then to answer for.

The rule of rejecting all manner of evidence in criminal prosecutions that is foreign to the point in issue is founded on sound sense and common justice. For no man is bound at the peril of life or liberty, fortune or reputation, to answer at once and unprepared for every action of his life. Few even of the best of men would choose to be put to it. And had not those concerned in state-prosecutions, out of their zeal for the publick service, sometimes stepped over this rule in the case of treasons, it would perhaps have been needless to have made an express provision against it in that case; since the common law grounded on the principles of natural justice hath made the like provision in every other.

The clauses in the act, which do not fall under either of the heads I have spoken to, come now to be considered.

SECT. 10.  
Peers and  
Peereffes.

SECT. 10. The 10th and 11th sections make provision for a more equal and indifferent trial of Peers and Peereffes in cases of treason and misprision. The mischief recited is, *That in the trial of a Peer or Peereffs THE MAJOR VOTE is sufficient for condemnation or acquittal; whereas, saith the act, in the trial of a commoner a jury of twelve freeholders must all agree in their verdict.* I doubt this was not the real mischief, because the remedy itself

itself is open to the same. The *major vote* is still sufficient and must be so; and if the method of trial in the court of the Lord High Steward was in contemplation, as I conceive it was, yet even there, though the *major vote* is sufficient, the majority must consist of *twelve or more*.

(Kel. 56.)

The real mischief, cautiously passed over, I take to have been, that in the trial of a Peer in the court of the High Steward the Peers-tryers were a select number returned at the nomination of the High Steward, and the prisoner was in every case debarred the benefit of a challenge. This was the *real* mischief, and it was in many cases severely felt. Accordingly the act applieth the proper remedy; for it enacteth, "That, upon the trial of any Peer or Peerefs for treason or misprision, all the Peers who have a right to sit and vote in Parliament shall be summoned twenty days before the trial to appear at such trial; and that every Peer so summoned and appearing shall vote in the trial of such Peer or Peerefs," having first taken the oaths appointed by the act\*.

Moo. pl. 849.  
(1 Inst. 156, b.)

The next clause provideth, "That neither this act nor any thing therein contained shall any way extend or be construed to extend to any impeachment or other proceedings in Parliament in any kind whatsoever." (Sect. 12.)

The words of the last clause are very general, and seem to exclude every proceeding in full Parliament for the trial of a Peer in the ordinary course of justice. But that construction was rejected in the cases of the Earls of *Kilmarnock* and *Cromartie* and of the Lord *Balmerino*; and accordingly all the Peers and Lords Spiritual were summoned; and those Lords who appeared having taken the oaths appointed by the act, the bishops upon the day the trial came on, after making the usual protestation, withdrew; and the prisoners, before their arraignment, were informed by the High Steward, that they were intitled to the benefit of this act in it's full extent.

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\* See the conference between the Lords and Commons upon this clause in *Kennet's 3d vol. p. 625*. Both Houses plainly understood the clause to refer to the trial of a Peer in the court of the Lord High Steward.

## CHAP. III.

The summoning the Lords Spiritual to the trial of those Lords was, I apprehend, a prudent caution, in order to obviate a doubt, that might otherwise, at that critical time, have arisen from the words of the statute, which, as I before observed, are very general. But, general as they are, I do not conceive, that they made that measure, though extremely prudent, *absolutely and indispensibly* necessary; for general words in a statute must be controuled by the apparent intent of the legislature; they must in construction be adapted to cases then in contemplation, and to every other provision in the statute, so as to render the whole one uniform consistent rule.

I will now in a few words apply this observation to the present case.

The act provideth, that every Peer so summoned and appearing shall vote *in the trial*. By voting *in* the trial must, as I apprehend, be meant voting *throughout* the trial, voting as a competent judge in every question that shall arise during the trial; and, above all, in the grand question for condemnation or acquittal. Now upon this last question the bishops cannot vote; though it hath been resolved, and practice hath established the rule, that in a proceeding in full Parliament in a case of blood, they may, if they choose it, vote upon all *previous* questions\*. But in a proceeding in the court of the High Steward, which, I conceive, this clause of the statute had principally in contemplation, and to which no mere spiritual Lord was ever summoned or could be, no question but for acquittal or condemnation is the subject of any vote; for in all points of law or practice the High Steward giveth the rule as sole judge in the court.

To conclude this head, the act may, with propriety enough, be said to regulate the proceeding in both courts, that of the High Steward and that in full Parliament; but it doth not alter the nature and constitution of either. Consequently, it doth not give to the Lords Spiritual any right in cases of blood, which they had not before; what conclusions soever men of interloping busy-talents may hereafter be tempted to

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\* See the Lords' Journal 13th and 14th May 1679, in the case of Lord Danby and the popish Lords.

draw from it, or from this precedent; which, as I said before, is founded in great wisdom for obviating doubts, which might have arisen, and proceeded from the same prudential motives from which the acts I have already cited for saving the rights of the Peerage did. The measure in both cases was extremely right but not of absolute indispensable necessity.

See Sect. 3 of this chapter.

SECT. 11. By the 5th and 6th sections of the act no prosecution shall be for any of the treasons or misprisions within the act, committed in *England, Wales, or Berwick upon Tweed*, unless the bill of indictment be found within three years after the offence committed; save in cases of assassination attempted on the person of the King by poison or otherwise.

Sect. 11. Limitation of prosecutions.

This limitation is by the letter of the act confined to the southern parts of *Great Britain*, and before the union it could not be otherwise. But I conceive, that by the general tenor of the 7 *An.* it is extended to treasons of the like kind committed in *Scotland*: it was so understood at the time of the rebellion in 1715; and therefore after all the proceedings upon the special commissions in *England* were over, another special commission went into *Scotland* merely for the finding bills of indictment in the proper counties and shewalties, in order to prevent the limitation taking place,

SECT. 12. I will now consider the clauses in the 7th of *Q. Anne*, which I before hinted at. The 11th section of that act provideth, "That when any person is indicted for high treason or misprision of treason, a list of the witnesses that shall be produced at the trial for proving the said indictment, and of the jury, mentioning the names, profession and place of abode of the said witnesses and jurors, shall be given at the same time that the copy of the indictment is delivered to the party indicted; and that copies of all indictments for the offences aforesaid with such lists shall be delivered *ten days* before the trial, and in the presence of two or more credible witnesses."

Sect. 12. Provisions of stat. 7 *Ann.* c. 21.

This

## CHAP. III.

See 17 Geo. II.  
c. 39.

This provision will, as the case now stands, take place upon the death of the pretender. Whether it may not be proper to postpone the effect of it to the death of his sons, upon the same motive that the clause in this act touching the corruption of blood upon an attainder for high treason hath been postponed to that event; or indeed whether it should be suffered to take place at all must be submitted to better judgments. But some objections have occurred to me, which I will mention.

(See 6 Geo. III.  
c. 53. l. 3.)

No provision is made with regard to the treasons not comprehended within the general purview of the 7th of King *William* or by name excepted out of it. The words of the act, "Indicted for high treason or misprision of treason," are large enough to take in all manner of high treasons and misprision of treason, and undoubtedly they will be so understood; for this act will be considered as one of those which merit a liberal construction.

When this clause shall take place no high treason or misprision of treason, *not even those concerning the coin*, can possibly be tried in the circuit, nor at the *Old Bailey*, without great delay and double expence: for the copy of the indictment cannot be delivered before it is found by the grand jury, they make the bill preferred to them an indictment by finding it; and ten clear days, exclusive of the day of delivery and the day of trial, and of intervening *Sundays*, which is the present practice founded on the 7th of King *William*, will carry the affair much beyond the time allowed for any assizes or ordinary gaol-delivery in the kingdom.

The furnishing the prisoner with the names, professions, and places of abode of the witnesses and jury so long before the trial may serve many bad purposes, which are too obvious to be mentioned. One good purpose, and but one, it may serve. It giveth to the prisoner an opportunity of informing himself of the character of the witnesses and jury. But this single advantage will weigh very little in the scale of justice, or sound policy, against the many bad ends which may be answered by it. However, if it weigheth any thing in the scale of justice, the Crown is intitled to the same opportunity of sifting the character of the prisoner's witnesses.

Equal



Equal justice is certainly due to the Crown and the publick. For let it be remembered, that the publick is deeply interested in every prosecution of this kind that is well founded. Or shall we presume, that all the management, all the practising upon the hopes or fears of witnesses lyeth on one side? It is true, power is on the side of the Crown. May it, for the sake of the constitutional rights of the subject, always remain where the wisdom of the law hath placed it! But in a Government like our's and in a most changeable climate, power, if, in criminal prosecutions, it be but suspected to aim at oppression, generally disarmeth itself. It raiseth and giveth countenance to a spirit of opposition, which falling in with the pride or weakness of some, the false patriotism of others, and the sympathy of all, not to mention private attachments and party-connections, generally turns the scale to the favourable side, and frequently against the justice of the case.

END OF THE DISCOURSE  
ON HIGH TREASON.



**D I S C O U R S E II.**

**O F**

**H O M I C I D E.**



# INTRODUCTION

## TO THE DISCOURSE ON HOMICIDE.

**I** SHALL consider the law touching homicide under the following distinctions.

It is either occasioned by accident, which human prudence could not foresee or prevent.

Or it is founded in justice.

Or in necessity.

Or it is owing to a sudden transport of passion, which, through the benignity of the law, is imputed to human infirmity.

Or it is founded in malice.

Before I proceed to these matters I think proper to premise a few things.

1. In every charge of murder, *the fact of killing being first proved*, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presumeth the fact to have been founded in malice, until the contrary appeareth. And very right it is, that the law should so presume. The defendant in this instance standeth upon just the same foot that every other defendant doth: the matters tending to justify, excuse, or alleviate must appear in evidence before he can avail himself of them.

Malice presumed.

(Ld. Raym. 1493. Stra. 773.)

2. In every case where the point turneth upon the question, whether the homicide was committed wilfully and maliciously, or under circumstances justifying, excusing, or alleviating, the matter of fact, viz. *whether the facts alledged by way of justification, excuse, or alleviation are true*, is the proper and only province of the jury. But whether, upon a supposition of the truth of facts, such homicide be justified, excused, or alleviated must be submitted to the judgment of the court; for the construction the law putteth upon facts

Province of the jury.

Province of the court.  
(Ld. Raym. 1493. Stra. 773.)

stated

stated and agreed, or found by a jury is in this, as in all other cases, undoubtedly the proper province of the court. In cases of doubt and real difficulty it is commonly recommended to the jury to state facts and circumstances in a special verdict. But where the law is clear, the jury, under the direction of the court in point of law, matters of fact being still left to their determination, may, and, if they are well advised, always will find a general verdict, conformably to such direction.

*Ad quæstionem juris non respondent juratores.*

Legal notion of  
malice.

3. When the law maketh use of the term *Malice aforethought*, as descriptive of the crime of murder, it is not to be understood in that narrow restrained sense, to which the modern use of the word *Malice* is apt to lead one, a principle of malevolence to particulars; for the law by the term *Malice* in this instance meaneth, that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit.

In the case of an appeal of death, which was antiently the ordinary method of prosecution, the term *Malice* is not, as I remember, made use of as descriptive of the offence of murder in contradistinction to simple felonious homicide. The precedents charge, that the fact was done *nequiter & in feloniam*, which fully taketh in the legal sense of the word *Malice*. The words *per malitiam* and *malitiosè* our oldest writers do indeed frequently use in some other cases; and they constantly mean an action flowing from a wicked and corrupt motive, a thing done *malo animo, malâ conscientia*, as they express themselves. Of which many instances might be given. I will mention one or two.

The method of proceeding in antient times in a case of robbery or larciny, where the stolen goods were found upon the defendant, was, that if he alledged that he bought them of another, whom he named and vouched to warranty, the vouchee, if he appeared and entered into warranty, was to stand in the place of the defendant *pro bono & malo*. Bracton speaking of this matter saith, *Intrat quandoque in defensionem & warrantum aliquis malitiosè & per fraudem & per mercedem, sicut campio conductitius.*—*Fleta*, on the same subject, after stating the case of the hired champion in Bracton's

De Coronâ,  
c. 32. f. 7.

Lib. 1. c. 38.  
f. 8, 9.

his words, putteth another similar to it. A person in holy orders entereth into warranty for hire, but refuseth to take his trial before lay-judges *propter privilegium clericale*. In this case, saith he, the warranty availeth nothing, "*Et clericus gaolæ pro malitiâ committetur & redimatur.*"

The legislature hath likewise frequently used the terms *malice* and *maliciously* in the same general sense, as denoting a wicked, perverse, and incorrigible disposition.

The statute *de malefactoribus in partis* reciteth, that those 21 E. I. st. c. 1. trespassers did frequently refuse to yield themselves to justice; "*immo malitiam suam proseguendo & continuando*" did flee or stand upon their defence.

The 4 and 5 Ph. and M. enacteth, "That every person C. 4. "that shall *maliciously* command, hire, or counsel any person to "do any robbery—and being arraigned shall stand mute of *malice*." The word in both parts of the act plainly importeth in general a wicked, perverse, and incorrigible disposition.

Numberless instances of the like kind might be produced; which, I doubt not, every attentive reader hath observed. But these are sufficient.

In the same latitude are the words *malice aforethought* to be understood in the statutes which oust clergy in the case of wilful murder. The *malus animus*, which is to be collected from all circumstances, and of which, as I before said, the court and not the jury is to judge, is what bringeth the offence within the denomination of wilful malicious murder, whatever might be the immediate motive to it; whether it be done, as the old writers express themselves, "*irâ vel odio, vel causâ lucri,*" or from any other wicked or mischievous incentive.

And I believe most, if not all the cases, which in our books are ranged under the head of *implied malice*, will, if carefully adverted to, be found to turn upon this single point, that the fact hath been attended with such circumstances as carry in them the plain indications of an heart regardless of social duty and fatally bent upon mischief\*.

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\* The word *malitia* is used in the same general sense in the best Roman authors and in the civil law. (See *Calvin's lexicon jurid.* or indeed any other approved dictionary. Verb. *Malitia*.) But I think it much safer to consult our own books for the sense of terms made use of in our law. See Lord *Raym.* 1487. *Kel.* 126, 127. (*Sir.* 770. 2 *Roll. Rep.* 461.)

I proceed now to the several species of homicide, as they fall under the distinctions before mentioned.

## C H A P. I.

Homicide occasioned by Accident, which human Prudence could not foresee or prevent, improperly called *Chance-medley*.

**T**HIS species of homicide is where a man doing a lawful act without intention of bodily harm to any person, and using proper caution to prevent danger, unfortunately happeneth to kill. A variety of cases coming within this description of homicide involuntary and merely accidental have been put by the writers on the subject, which it is not necessary for me to repeat in this place. It will be of more general service to state the several restrictions and limitations, under which this rule is to be considered, which will make the true extent of it better understood.

Sect. 1.  
Death from an  
act lawful or  
unlawful.

3 Inst. 56.

SECT. I. In order to bring the case within this description, the act upon which death ensueth must be lawful: for, if the act be unlawful, I mean if it be *malum in se*, the case will amount to felony, either murder or manslaughter, as circumstances may vary the nature of it. If it be done in prosecution of a felonious intention it will be murder, but if the intent went no farther than to commit a bare trespass, manslaughter: though, I confess, Lord *Coke* seemeth to think otherwise.

I do not intend to enter into a long detail of cases falling within this rule, or any others which I shall lay down. I will content myself with a few plain instances: for I have neither leisure nor inclination to give the reader a common-place of what other writers have said. My design is, as far as I am able, to reduce every subject I treat of to its principles; and the cases I cite are intended merely by way of illustration.

Kel. 117.  
6 St. Tri. 222.

*A.* shooteth at the poultry of *B.* and by accident killeth a man; if his intention was to steal the poultry, which must  
be



be collected from circumstances, it will be murder by reason of that felonious intent; but if it was done wantonly and without that intention it will be barely manslaughter.

CHAP. I.]

The rule I have laid down supposeth, that the act from which death ensued was *malum in se*: for if it was barely *malum prohibitum*, as shooting at game by a person not qualified by statute-law to keep or use a gun for that purpose, the case of a person so offending will fall under the same rule as that of a qualified man; for the statutes prohibiting the destruction of the game, *under certain penalties*, will not, in a question of this kind, enhance the accident beyond it's intrinsic moment.

1 Hale 475;

SECT. 2. Death ensuing from accidents happening at sports and recreations; *such recreations being innocent and allowable*, falls within the rule of excusable homicide. Lord Hale indeed seemeth to be of opinion, that persons playing at cudgels or foils, or wrestling by consent, if death ensueth from a blow, push, or fall given in those exercises, ought to be excepted out of this rule. This opinion he groundeth upon a principle very true when properly applied; but he seemeth in this place, I speak it with great deference, to be mistaken in the application of it. "He, saith the learned judge, that voluntarily and knowingly intends hurt to the person of a man, though he intend not death, yet if death ensues; it excuseth not from the guilt of murder, or manslaughter at least; as if *A.* intends to beat *B.* but not to kill him; yet if death ensues, this is murder or manslaughter, as the circumstances of the case happen."

Sect. 2.  
At sports and  
recreations.  
1 Hale 472, and  
Sum. 574

If *A.* intendeth to beat *B.* in anger or from preconceived malice, and death ensueth; it will doubtless be no excuse, that he did not intend all the mischief that followed: for what he did was *malum in se*, and he must be answerable for the consequence of it. He certainly beat him with an intention of doing him some bodily harm, he had no other intent, he could have no other; he is therefore answerable for all the harm he did. But is this the case of persons who in perfect friendship engage by mutual consent in any of those recreations for a trial of skill or manhood, or for improve-

## CHAP. I.

ment in the use of their weapons? Here is indeed the appearance of a combat, but it is in reality no more than a friendly exertion of strength and dexterity for the purposes I have mentioned. And, which taketh the case out of the general rule laid down by the learned judge, and entirely distinguisheth it from that he putteth by way of illustration, *bodily harm was not the motive on either side*. I therefore cannot call these exercises unlawful; they are manly diversions, they tend to give strength, skill, and activity, and may fit people for defence, publick as well as personal, in time of need. I would not be understood to speak here of prize-fighting and publick boxing-matches, or any other exertions of courage, strength and activity of the like kind, which are exhibited for lucre, and can serve no valuable purpose, but on the contrary encourage a spirit of idleness and debauchery; for these disorders will, I conceive, fall under a quite different consideration.

As to playing at foils, I cannot say, nor was it ever said that I know of, that it is not lawful for a gentleman to learn the use of the small-sword; and yet that cannot be learned without practising with foils. The learned judge in the passages last referred to citeth two cases against this exercise. The first is not particularly stated, and therefore I say nothing to it. The other, Sir *John Chichester's* case, doth not in my opinion conclude to the point in question; *for there was in fact no playing AT FOILS in that case*; Sir *John* passed at his servant with his sword in the scabbard, he parried with a bedstaff; and in the heat of the exercise the chape of the scabbard flew off, and the servant was killed by the point of the sword. Sir *John* ought not to have used a deadly weapon with so little caution. The chape was likely enough to be beaten off in the violence of the play, and if that should happen, death, or some great bodily harm must ensue. He did not use that degree of circumspection which common prudence would have suggested; and therefore the fact, *so circumstanced*, might well amount to manslaughter, though the exercise itself with proper weapons might have been otherwise lawful.

The

The learned judge mentioneth the case of publick jousts and tournaments without the command of the King, as falling within the same rule with the exercises just mentioned: but the cases differ greatly; for publick jousts and tournaments drew a great concourse of high spirits and warm blood into the field, *assemblies not always consistent with the publick tranquillity, and seldom ending without some bloodshed.* And for that reason, I presume, it was, that even in those days of chivalry they were deemed unlawful assemblies, unless by special licence from the Crown.

See Madox's Baronia Anglica, lib. 3. c. 8.

A man at the diversion of cock-throwing at shrovetide, which hath too long prevailed, missed his aim; and a child looking on received a blow from the staff, of which he soon died. I once in the circuit ruled it manslaughter. It is a barbarous unmanly custom, frequently productive of great disorders, dangerous to the by-standers, and ought to be discouraged.

SECT. 3. If an action unlawful in itself be done deliberately and with intention of mischief or great bodily harm to particulars, or of mischief indiscriminately, fall it where it may, and death ensue against or beside the original intention of the party, it will be murder. But if such mischievous intention doth not appear, which is matter of fact and to be collected from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death, because the act upon which death ensued was unlawful.

Sect. 3.  
A person undesignedly killed in doing an unlawful act.

Under this head I will mention a case, which, through the ignorance or lenity of juries, hath been sometimes brought within the rule of accidental death. It is where a blow aimed at one person lighteth upon another and killeth him. This in a loose way of speaking may be called accidental *with regard to the person who dieth by a blow not intended against him.* But the law considereth this case in a quite different light. If from circumstances it appeareth, that the injury intended to *A*, be it by poison, blow, or any other means of death, would have amounted to murder supposing *him* to have been killed by it, it will amount to the same offence if *B*. happeneth to fall by the same means. Our books say,

(Plowd. 473.  
9 Co. 81. Kel.  
111, 132, 134.)

## CHAP. I.

that in this case the malice *egreditur personam*. But to speak more intelligibly, where the injury intended against *A.* proceeded from a wicked, murderous, or mischievous motive, the party is answerable for all the consequences of the action, if death ensueth from it, though it had not it's effect upon the person whom he intended to destroy. The *malitia* I have already explained, the heart regardless of social duty and deliberately bent upon mischief, and consequently the guilt of the party is just the same in the one case as in the other. On the other hand, if the blow intended against *A.* and lighting on *B.* arose from a sudden transport of passion, which in case *A.* had died by it would have reduced the offence to manslaughter, the fact will admit of the same alleviation if *B.* should happen to fall by it.

Sect. 4.  
Caution necessary in doing a lawful act.

(1 Hale 454.)

Comb. 408.  
1 Hale 474.  
Kel. 64, 133,  
134.

SECT. 4. It is not sufficient, that the act upon which death ensueth be lawful or innocent, it must be done in a proper manner and with due caution to prevent mischief. Parents, masters, and other persons, having authority *in foro domestico*, may give reasonable correction to those under their care; and if death ensueth without their fault, it will be no more than accidental death. But if the correction exceedeth the bounds of due moderation, either in the measure of it or in the instrument made use of for that purpose, it will be either murder or manslaughter according to the circumstances of the case. If with a cudgel or other thing not likely to kill, though improper for the purpose of correction, manslaughter. If with a dangerous weapon likely to kill or maim, due regard being always had to the age and strength of the party, murder.

This rule touching due caution ought to be well considered by all persons following their lawful occupations, especially such from whence danger may probably arise.

Workmen throw stones, rubbish, or other things from an house in the ordinary course of their business, by which a person underneath happeneth to be killed. If they look out and give timely warning beforehand to those below, it will be accidental death. If without such caution, it will amount

to manslaughter at least. It was a lawful act, but done in an improper manner \*.

CHAP. I.

\* 1 Hale 472,

475.

† Kel. 40.

It is indeed said in *Kelyng* †, that if this be done in the streets of *London* or other populous towns, it will be manslaughter notwithstanding the caution I have mentioned is used. But this will admit of some limitation. If it be done early in the morning, when few or no people are stirring, and the ordinary caution is used, I think the party is excusable. But when the streets are full *that* will not suffice; for in the hurry and noise of a crowded street few people hear the warning or sufficiently attend to it.

A person driving a cart or other carriage happeneth to kill. If he saw or had timely notice of the mischief likely to ensue, and yet drove on, it will be murder; for it was wilfully and deliberately done. Here is the heart regardless of social duty, which I have already taken notice of. If he might have seen the danger, but did not look before him, it will be manslaughter for want of due circumspection. But if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death, and the driver will be excused.

1 Hale 476.

I need not state more cases by way of illustration under this head; these are sufficient. But I cannot pass over one reported by *Kelyng*, because I think it an extremely hard case, and of very extensive influence. A man found a pistol in the street, which he had reason to believe was not loaded, *having tried it with the rammer*; he carried it home and shewed it to his wife; and she standing before him he pulled up the cock, and touched the trigger. The pistol went off and killed the woman. This was ruled manslaughter.

Kel. 41.

It appeareth, that the learned editor was not satisfied with the judgment. It is one of the points he in the preface to the report recommendeth to farther consideration.

Ch. Just. Holt.

Admitting that the judgment was strictly legal, it was, to say no better of it, *sumum jus*.

I cannot help saying, that the rule of law I have been considering in this place, touching the consequence of taking or

## CHAP. I.

P 3. 2.

not taking due precaution, doth not seem to be sufficiently tempered with mercy. Manslaughter was formerly a capital offence, as I shall hereafter shew; and even the forfeiture of goods and chattels upon the foot of the present law is an heavy stroke upon a man, guilty, it is true, of an heedless incautious conduct, but *in other respects perfectly innocent*: and where the rigour of law bordereth upon injustice, mercy should, if possible, interpose in the administration. It is not the part of judges to be perpetually hunting after forfeitures, *where the heart is free from guilt*. They are ministers appointed by the Crown for the ends of publick justice; and should have written on their hearts the solemn engagement his Majesty is under “to cause law and justice *in mercy* to be executed in all his “judgments.”

Coronation  
 11th, 1 W. &  
 12th, 1st. 1. c. 6.

This I have said upon a supposition that the judgment reported by *Kelyng* was strictly legal. I think it was not: for the law in these cases doth not require the *utmost* caution that *can be used*; it is sufficient that a reasonable precaution, what is *usual and ordinary* in the like cases, be taken. In the case just mentioned of workmen throwing rubbish from buildings, the ordinary caution of looking out and giving warning by outcry from above will excuse, though doubtless a better and more effectual warning might have been given: but this excuseth, because it is what is usually given, and hath been found by long experience, in the ordinary course of things, to answer the end. The man in the case under consideration examined the pistol in the common way; perhaps the rammer, which he had not tried before, was too short and deceived him: but having used the ordinary caution, found to have been effectual in the like cases, he ought to have been excused.

I have been the longer upon this case, because accidents of this lamentable kind may be the lot of the wisest and the best of mankind, and most commonly fall amongst the nearest friends and relations: and in such a case the forfeiture of goods, rigorously exacted, would be heaping affliction upon the head of the afflicted, and galling an heart already wounded past cure. It would even aggravate the loss of a brother, a parent, a child, or wife, if  
 such

such a loss under such circumstances is capable of aggravation.

I once upon the circuit tried a man for the death of his wife by the like accident. Upon a *Sunday* morning the man and his wife went a mile or two from home with some neighbours to take a dinner at the house of their common friend. He carried his gun with him, hoping to meet with some diversion by the way; but before he went to dinner he discharged it, and set it up in a private place in his friend's house. After dinner he went to church, and in the evening returned home with his wife and neighbours, bringing his gun with him, which was carried into the room where his wife was, she having brought it part of the way. He taking it up touched the trigger, and the gun went off and killed his wife, whom he dearly loved. It came out in evidence, that, while the man was at church, a person belonging to the family privately took the gun, charged it and went after some game; but before the service at church was ended returned it *loaded* to the place whence he took it, and where the defendant, who was ignorant of all that had passed, found it, to all appearance as he left it. I did not inquire, whether the poor man had examined the gun before he carried it home; but being of opinion upon the whole evidence, that he had reasonable grounds to believe that it was not loaded, I directed the jury, that if *they were* of the same opinion they should acquit him: and he was acquitted.

SECT. 5. Accidental death, which happeneth without the intervention of human means, induceth a forfeiture, which the ignorance and superstition of antient times called a *Deodand*. These forfeitures were part of the casual revenues of the Crown; and the value, when found by the coroner's inquest, was put in charge to the sheriff, in order to be levied on the ville where the accident happened; and was paid into the hands of the King's almoner to be applied to pious uses for the soul of the deceased.

Sect. 5.  
Deodands.

This forfeiture, which is not now applied to superstitious uses, is still part of the revenue of the Crown, unless where  
Lords

## CHAP. I.

1 Inst. 114.  
1 Hale 419.

Lords of franchises are intitled to it by grant; for no man can prescribe to it, or to the goods of felons of themselves, or other felons, or outlaws happening within his royalty.

I have nothing to add to what other writers have said touching deodands more than to observe, that as this forfeiture seemeth to have been originally founded rather in the superstition of an age of extreme ignorance than in the principles of sound reason and true policy, it hath not of late years met with great countenance in *Westminster-hall*: and when juries have taken upon them to use a judgment of discretion, not strictly within their province, for reducing the *quantum* of the forfeiture, (I wish the temptation to it was taken out of their way,) the court of King's Bench hath refused to interpose in favour of the Crown or Lord of the franchise.

It hath frequently interposed it's authority as sovereign coroner in this case, and also in the case of suicide, *in favour of the subject and to save the forfeiture*, but will not do it in either case *to his prejudice*; and herein it proceedeth upon the same principle of equitable justice, that the courts of *Westminster-hall* constantly do in refusing to set aside a wrong verdict given in *favour* of the defendant in a criminal case, or in an hard action, though it is done every day where a wrong verdict goeth against him.

(2 Barnard. 32.  
311.)

In the case of the King and *Rolfe* coroner of *Kent*, which came on in *Mich. and Hil.* the 5th of the King, the coroner's inquest found, that *A. B.* sitting on his waggon accidentally fell to the ground, and that, the horses drawing the waggon forward, one of the forewheels crushed his head, of which he instantly died; and then concluded, that the wheel, on which they set a small value, *only* moved to his death. A motion was made, in behalf of Mr. *Mompesson* Lord of the franchise, for quashing this inquisition, upon affidavits tending to shew, that the cart and horses were equally instrumental; which indeed the finding of the jury did sufficiently imply: but the court was very clear, that neither this court nor the coroner can oblige the jury to conclude otherwise than they have done, and would not suffer the affidavits for quashing the inquisition.



fiction to be read. A like case came on in *Mich.* the 29th of the King, the King against *Grew* coroner of *Middlesex*. The coroner's jury, upon view of the body of a person killed by the like accident, found, that one wheel of the waggon *only* moved to the death. The court, on motion in behalf of the Lord of the franchise, granted a rule for shewing cause why the inquisition should not be quashed for this misbehaviour of the jury. On the day for shewing cause Mr. *Hume Campbell*, counsel for the Lord of the franchise, informed the court, that upon looking into precedents he was satisfied he could not support the rule, and thereupon it was discharged. The case of the King and *Rolfe* was mentioned on this occasion, and greatly relied on,

CHAP. II.

Homicide founded in Justice.

SECT. I. **T**HE execution of malefactors under sentence of death for capital crimes hath been considered by former writers as a species of homicide founded in necessity. I think it hath with propriety enough been so considered; for the ends of government cannot be answered without it. Lord *Hale* hath treated this subject pretty much at large: and as it is not a matter of very general concernment, and as few questions are likely to arise upon it, I refer the reader to what the learned judge hath said upon the subject. One of his rules indeed seemeth to want some explanation: *that the execution ought not to vary from the judgment; for if it doth, the officer will be guilty of felony at least, if not of murder.*

SECT. 1.  
Execution of  
malefactors.

1 Hale 496—  
502.

1 Hale 501.  
2 Hale 411.

This is a good general rule, but not universally true. If the officer of his own head, and without warrant, or the colour of authority, varieth from the judgment, he may be criminal to that degree the learned author mentioneth; for he wilfully and deliberately acteth in defiance of law, and in so doing sheddeth the blood of a man, whose person, till execution is done upon him in a due course of justice, is equally under the

CHAP. H. the protection of the law with every other subject. But if the officer hath a warrant from the Crown for beheading a person under sentence of death for felony, or a woman for treason of any kind, and payeth obedience to it, this, I conceive, would not be criminal. Lord *Coke* indeed doth say, that a warrant from the Crown for an execution *totally varying from the judgment* is illegal, because the King cannot *alter* the judgment, though he may, by his prerogative, *remit* one part, and leave the offender open to the other; as, saith he, in the case of high treason, decapitation *being part of the judgment*, the law is satisfied, the judgment is substantially executed, if that be done, though every other part is omitted: and *Hale* seemeth to agree with him.

3 Inst. 52, 211.

(4 St. Tri. 129.)

That the Crown may remit part of the judgment is certainly true, and would silence every doubt in the case of high treason at least, if hanging and beheading were ingredients in every judgment for that offence: but in the case of women, beheading is no ingredient in the judgment; and yet ladies of distinction have been, for many ages past, by warrant from the Crown beheaded for that offence. The execution in this instance *totally* varieth from the judgment; and yet I do not know, that those executions have been esteemed illegal: nor can I recollect a single instance where a lady of distinction hath been burnt for high treason; and, with regard to those of inferior rank who have been burnt, it is well known, that they have generally been strangled at the stake by the executioner before the fire hath reached them, though the letter of the judgment is, that they shall be burnt in the fire *till they are dead*. This the sheriff doth, or knowingly permitteth, without warrant from the Crown, custom alone having given a kind of sanction to a practice founded in humanity and not repugnant to any rule of substantial justice. I remember one and but one instance to the contrary, which will be mentioned in it's proper place. Beheading is likewise no ingredient in the judgment for felony; and yet persons of distinction have, for ages past, been by the like warrants beheaded for that offence; and nobody hath complained or thought the execution illegal.

P. 336.

(15 Rym. 295,  
296. 19 Rym.  
234.)

The

The distinction therefore between a total alteration and a remission of part of the judgment will not wholly solve the difficulty, if any difficulty there be; though a partial solution may sometimes serve to save appearances. But this matter seemeth to lie in a very narrow compass. The King cannot by his prerogative vary the execution, so as to *aggravate the punishment beyond the intention of the law*. Thus far the rule, that the King cannot alter the judgment is true: but it doth not follow from thence, that he, *who undoubtedly can wholly pardon the offender*, cannot mitigate his punishment with regard to the pain or infamy of it. Will it be said, that, because the crown cannot go beyond the letter of the law *in point of rigour*, it's mercy is likewise so bounded? By no means; for the law proceedeth in both cases with a perfect uniformity of sentiment and motive. The benignity of the law hath set bounds to the prerogative in one case, and the same benignity hath left it free and unconfined in the other.

In the cases just mentioned it cannot perhaps be said, with strict propriety, that *the judgment is substantially executed*; but surely the ends of publick justice are effectually answered if the offender suffereth death, the *ultimum supplicium*, though the circumstances of infamy or extreme rigour, which the judgment importeth, are dispensed with: and whenever that hath been done, it hath in all ages been esteemed a matter of royal grace, and granted at the prayer of the party or his friends.

The writ of *escheat*, grounded on the common-law, in the case of an attainder for felony alledged, that the party was hanged, whether, say the books, *he was BEHEADED or died before execution*, which averment is not traversable. This, saith the note on the register, was adjudged in Parliament in the 8th of *Edw. III.* And in the statute stiled *Articuli Cleri* one grievance complained of is, "That persons fleeing to sanctuary and abjuring" (a privilege never allowed but in cases of felony) "had been taken by force from the publick highway and then hanged or beheaded." Lord *Coke* in his comment at the word [*decapitantur*] saith, "This is mistaken in the petition, for no man can be beheaded but for treason." The mistake, if any there be, was in a mere matter of fact of great  
and

Regist. 163, a.  
F.N.B. 144. H.  
4to. edit. 339.  
Stanf. 198, A.

9 Ed. II. c. 10.

**CHAP. II.** and publick notoriety at that time; and therefore, where the mistake upon the whole most probably lieth, whether in the petition or in the comment, the reader must judge.

These authorities, in my opinion, prove to a demonstration, that in those early ages the judgment for hanging was the legal ordinary judgment in the case of felony, and that execution was commonly done in that manner. They shew likewise, that beheading in some special cases upon a judgment in felony hath been practised in all ages.

I therefore conclude, till I shall be better informed, that the prerogative now under consideration, founded in mercy, and never in any age complained of, is part of the common-law.

3 Inst. 212.

Lord *Coke* in one of the passages I have cited, after admitting that in the cases he mentioneth the execution did vary from the judgment, concludeth, "*Judicandum est legibus non ex-  
"emphis."* The rule is true, but the mistake lieth in the application of it; for immemorial usage, founded in mercy and never complained of, is undoubtedly sufficient in this, as in every other case, to determine what is or is not part of the common-law.

Sect. 2.

Persons having  
authority to  
arrest killing or  
killed.  
(1 Hale 494.)

**SECT. 2.** Homicide in advancement of justice may likewise be considered as founded in necessity; for the ends of government will be totally defeated, unless persons can, in a due course of law, be made amenable to justice. And therefore where persons having authority to arrest or imprison, using the proper means for that purpose, are resisted in so doing, and the party making resistance is killed in the struggle, this homicide is justifiable: and on the other hand, if the party having authority to arrest or imprison, using the proper means, happeneth to be killed, it will be murder in all who take a part in such resistance; for it is homicide committed in despite of the justice of the kingdom.

(3 Inst. 56.  
2 Hale 117,  
118.)

The rule I have laid down supposeth, that resistance is made: and upon that supposition it will, I conceive, hold in all cases, whether civil or criminal; for in the case of resistance in either case the person having authority to arrest or imprison  
may

may repel force by force, and if death ensueth in the struggle he will be justified. This is founded in reason and publick utility; for few men would quietly submit to an arrest, if in every case of resistance the party impowered to arrest was obliged to desist and leave the business undone. I think the opinion in *1 Rolle's Report* is too severe.

CHAP. II.

F. 189.

SECT. 3. The case of bare flight in order to avoid an arrest in a civil proceeding, and likewise in some cases of a criminal nature, will fall under a different consideration. A defendant in a civil suit being apprehensive of an arrest fleeth, the officer pursueth, and in the pursuit killeth him; *this, saith Lord Hale, will be murder.*

Sect. 3.  
A person fleeing to avoid an arrest killed.

1 Hale 481.

I rather choose to say, it will be murder or manslaughter, as circumstances may vary the case; for if the officer in the heat of the pursuit, and merely in order to overtake the defendant, should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon *not likely to kill*, and death should unhappily ensue, I cannot think, that this will amount to more than manslaughter, if in some cases even to that offence. The blood was heated in the pursuit, his prey, *a lawful prey*, just within his reach, and no signal mischief was intended. But had he made use of a deadly weapon, it would have amounted to murder. The mischievous vindictive spirit, the *malitia* I have already explained, which always must be collected from circumstances, determineth the nature of the offence.

SECT. 4. What hath been said with regard to bare flight in a proceeding merely civil is equally true in the case of a breach of the peace, or any other misdemeanour short of felony. But where a felony is committed, and the felon fleeth from justice, or a dangerous wound is given, it is the duty of every man to use his best endeavours for preventing an escape; and if in the pursuit the party fleeing is killed, *where he cannot be otherwise overtaken*, this will be deemed justifiable homicide; for the pursuit was not barely warrantable, it is what the

Sect. 4.  
A felon, or person having given a wound, flees and is killed, or kills. See the case of Guiscard. Stat. 9 An. c. 16.  
1 Hale 489, 490.

## CHAP. II.

(2 Hale 93.)

the law requireth and will punish the *wilful* neglect of. I may add, that it is the duty of every man in these cases quietly to yield himself up to the justice of his country: and for this reason it is, that flight alone upon a charge of felony induceth a forfeiture of goods, though the party upon his trial may be acquitted of the fact; for he hath done what in him lay to stop the course of publick justice.

Some writers have thought, that this forfeiture is founded on a legal presumption of the guilt of the party *grounded on his flight*; but in the case of an acquittal all presumption of that kind must be at an end. It is presumption against fact.

These rules are founded in publick utility, *ne maleficia remaneant impunita*.

And if in the cases last mentioned the felon, or person giving a dangerous wound, turneth upon the pursuers, and in the scuffle any one of them is killed, this will be murder in the person so resisting, and all his adherents present and knowingly abetting, for the reason given in the second section.

Kel. 66, 115.

And even in the case of a sudden affray, where no felony is committed or wound given, if a person interposing to part the combatants, *giving notice to them of his friendly intention*, should be assaulted by them or either of them, and in the struggle should happen to kill; this, I take it, will be justifiable homicide; and on the other hand, if the party so interposing, *giving such notice*, should be killed by either of the combatants, it will be murder in the person so killing: for it is the duty of every man to interpose in such cases for preserving the publick peace and preventing mischief.

Stanf. 13.  
2 Inst. 52.

This rule is founded in the principles of social duty and political justice.

## C H A P. III.

## CHAP. III.

## Homicide founded in Necessity.

SECT. I. SELF-DEFENCE naturally falleth under the head of homicide founded in necessity, and may be considered in two different views.

Sect. 1.

It is either that sort of homicide *se & sua defendendo*, which is perfectly innocent and justifiable, or that which is in some measure blameable and barely excusable. The want of attending to this distinction hath, I believe, thrown some darkness and confusion upon this part of the law.

Self-defence justifiable or excusable.

The writers on the Crown-law, who, I think, have not treated the subject of self-defence with due precision, do not in terms make the distinction I am aiming at, yet all agree, that there are cases in which a man may without retreating oppose force to force, even to the death. This I call justifiable self-defence, they justifiable homicide.

They likewise agree, that there are cases in which the defendant cannot avail himself of the plea of self-defence without shewing that he retreated as far as he could with safety, and then, merely for the preservation of his own life, killed the assailant. This I call self-defence culpable, but through the benignity of the law excusable.

In the case of justifiable self-defence the injured party may repel force by force in defence of his person, habitation, or property, against one who manifestly intendeth and endeavoureth by violence or surprize to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if in a conflict between them he happeneth to kill, such killing is justifiable.

Justifiable self-defence.

Ecl. 128, 1:9.

The right of self-defence in these cases is founded in the law of nature, and is not, nor can be, superseded by any law of society: for before civil societies were formed, (one may conceive of such a state of things though it is difficult to fix

S

the

CHAP. III. the period when civil societies were formed,) I say before societies were formed for mutual defence and preservation, the right of self-defence resided in individuals; it could not reside elsewhere: and since in cases of necessity, individuals incorporated into society cannot resort for protection to the law of the society, that law with great propriety and strict justice considereth them, as *still, in that instance*, under the protection of the law of nature.

I will, by way of illustration, state a few cases, which, I conceive, are reducible to this head of justifiable self-defence.

- (1 Hale 481.) Where a known felony is attempted upon the person, be it to rob or murder, here the party assaulted may repel force by force; and even his servant then attendant on him, or any other person present may interpose for preventing mischief; and if death ensueth, the party so interposing will be justified. In this case nature and social duty cooperate.
- (1 Hale 484.) A woman in defence of her chastity may lawfully kill a person attempting to commit a rape upon her. The injury intended can never be repaired or forgotten; and nature, to render the sex amiable, hath implanted in the female heart a quick sense of honour, *the pride of virtue*, which kindleth and enflameth at every such instance of brutal lust. Here the law of self-defence plainly coincideth with the dictates of nature.
- (Bro. Cor. 100. Cro. Car. 544.) An attempt is made to commit arson or burglary in the habitation; the owner, or any part of his family, or even a lodger with him may lawfully kill the assailants for preventing the mischief intended\*. Here likewise nature and social duty cooperate.
- Kel. 123. In *Mawgridge's* case, he, upon words of anger between him and Mr. *Cope*, threw a bottle with great violence at the head of Mr. *Cope*, and immediately drew his sword, Mr. *Cope* returned the bottle with equal violence. It was, saith Lord Holt, lawful and justifiable in Mr. *Cope* so to do: "*for,*" as he argueth a little afterwards, "*be that hath manifested,*
- Ibid. 129.

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\* See Kel. 51. a much stronger case. Persons rudely forcing themselves into a room in a tavern against the will of the company in possession, one of the assailants is killed in the scuffle; Ruled justifiable homicide. But Qu.

"that



"that he hath malice against another is not fit to be trusted with  
"a dangerous weapon in his band." CHAP. III.

It was upon this principle, I presume, and possibly too upon the rule already laid down touching the arrest of a person who had given a dangerous wound, that the legislature in the case of the Marquis *de Guiscard*, who stabbed Mr. *Harley* sitting in council, discharged the party who was supposed to have given him the mortal wound from all manner of prosecution on that account; and declared the killing to be a *lawful and necessary action*. P. 271. 9 An. c. 16.

SECT. 2. I will now proceed to that sort of self-defence which is culpable and through the benignity of the law excusable: and this species of self-defence, I choose, upon the authority of the statute of *Hen. VIII.*, to distinguish from the other by the name of homicide *se defendendo upon chance-medley*. The term *chance-medley* hath been very improperly applied to the case of accidental death, and in vulgar speech we generally affix that single idea to it: but the antient legal notion of homicide by chance-medley was when death ensued from a combat between the parties upon a sudden quarrel\*. How, upon the special circumstances of the case, the species of homicide *se defendendo* which I am now upon is distinguishable from that species of felonious homicide which we call manslaughter will be presently considered. Sect. 2. Excusable self-defence. 24 H. VIII. c. 5. 3 Inst. 55, 57. Kel. 67.

The difference between justifiable and excusable self-defence appeareth to me to be plainly supposed and pointed out by the statute I have just mentioned; for after reciting, that it had been doubted whether a person killing another attempting to rob or murder him under the circumstances there mentioned should forfeit goods and chattels, "as," proceedeth the statute, "any other person should do that by *chance-medley* should happen to kill or slay any other person *in his or their defence*," it enacteth, That in the cases first mentioned the party killing shall forfeit nothing, but shall be discharged in *like manner as if he were acquitted* of the death.

\* See *Shene—De verborum significatione. Verb. Chaud-melle.*

CHAP. III. I will make an observation or two upon this act.

1. Though it expressly provideth against a forfeiture in the special cases therein mentioned, upon which, saith the preamble, *doubts had arisen*, that express provision doth not imply an exclusion of any other cases of justifiable homicide, which stand upon the same foot of reason and justice; for the statute was plainly made in affirmance of the common-law, and to remove a doubt, that had been entertained in the cases specially provided for.

2. Two cases of self-defence are supposed. In the one a forfeiture of goods was incurred, in the other not. What therefore is the true import of the words *self-defence upon chance-medley*, which the statute useth as descriptive of that offence which did incur the forfeiture? Homicide *per infortunium*, which hath been stiled chance-medley, cannot possibly be meant; for in that case the party killing is supposed to have no intention of hurt: whereas in the case the statute mentioneth he is presumed to have an intention to kill or to do some great bodily harm *at the time the death happened at least*, but to have done it for the preservation of his own life. The word *chance-medley* therefore, as it standeth in this statute connected with self-defence, must be understood in the sense which *Coke* and *Kelyng*, in the passages already cited, say was the original import of it, a sudden casual affray commenced and carried on in heat of blood; and consequently *self-defence upon chance-medley* must, as I apprehend, imply, that the person when engaged in a sudden affray quitted the combat before a mortal wound given, and retreated or fled as far as he could with safety, and then, urged by mere necessity, killed his adversary for the preservation of his own life\*.

This case bordereth very nearly upon manslaughter, and in fact and experience the boundaries are in some instances scarcely perceivable: but in consideration of law they have been fixed.

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\* It may be thought time mispent to enter into an etymological dispute touching the term *chance-medley*, since the statute I have cited seemeth to have fixed the legal notion of it. The word *medley* is derived from *medleu*, *mesleu*, or *mesleia* barbarous Latin terms, which signified an affray. And whether the compound *chance-medley* be written *chaud-medley* or *chaud-melle* an affray in the heat of blood, or *chance-medley* a sudden casual affray, the difference in point of sense is very small; and, if any there be, the definition I have given of the thing taketh in both. The word is written both ways in different glossaries, all of established reputation.

In both cases it is supposed, that passion hath kindled on each side, and blows have passed between the parties: but in the case of manslaughter it is either presumed, that the combat on both sides hath continued to the time the mortal stroke was given, or that the party giving such stroke was not at that time in imminent danger of death.

He therefore who, in the case of a mutual conflict, would excuse himself upon the foot of self-defence must shew, that before a mortal stroke given he had declined any farther combat and retreated as far as he could with safety; and also that he killed his adversary through mere necessity, and to avoid immediate death. If he faileth in either of these circumstances he will incur the penalties of manslaughter.

The authorities I shall cite will serve to explain these principles, and in some measure fix the boundaries between the cases of manslaughter and excusable self-defence.

*A. being assaulted by B. returneth the blow, and a fight ensueth. A. before a mortal wound given declineth any farther conflict, and retreateth as far as he can with safety, and then, in his own defence, killeth B.; this is excusable self-defence; though, saith Stanford, A. had given several blows not mortal before his retreat.* 1 Hale 479. Stanf. 15.

But if the mortal stroke had been first given, it would have been manslaughter. *Ibid.*

The cases here put suppose, that the first assault was made upon the party who killed in his own defence. But as in the case of manslaughter upon sudden provocations, where the parties fight on equal terms, all malice apart, it mattereth not who gave the first blow; so in this case of excusable self-defence, I think the first assault in a sudden affray, all malice apart, will make no difference, if either party quitteth the combat and retreateth before a mortal wound be given: but if the first assault be upon malice, which must be collected from circumstances, and the assailant, to give himself some colour for putting in execution the wicked purposes of his heart, retreateth, and then turneth and killeth, this will be murder. If he had killed without retreating it would

1 Hale 479, 430

CHAP. III.  
Kol. 58, 128.

undoubtedly have been so ; and the craft of fleeing rather aggravateth than excuseth, as it is a fresh indication of the *malitia* already mentioned, the heart deliberately bent upon mischief.

MSS. Tracy and  
Denton.

The other circumstance necessary to be proved in a plea of self-defence is, that the fact was done from mere necessity, and to avoid immediate death. To this purpose I will cite a case adjudged upon great deliberation. It was the case of one *Nairn*, which came on at O. B. in Apr. 1704, before *Holt, Tracy, and Bury*.

The prisoner was indicted for the murder of his brother, and the case upon evidence appeared to be, that the prisoner on the night the fact was committed came home drunk. His father ordered him to go to bed, which he refused to do ; whereupon a scuffle happened betwixt the father and son. The deceased, who was then in bed, hearing the disturbance got up, and fell upon the prisoner, threw him down, and beat him upon the ground ; and there kept him down, so that he could not escape, nor avoid the blows ; and as they were so striving together the prisoner gave the deceased a wound with a penknife ; of which wound he died.

The judges present doubted, whether this was manslaughter or *se defendendo*, and a special verdict was found to the effect before set forth.

After *Michaëmas* term, at a conference of all the judges of *England*, it was unanimously holden to be manslaughter ; for there did not appear to be any inevitable necessity so as to excuse the killing in this manner \*.

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\* The deceased did not appear to aim at the prisoner's life, but rather to chastise him for his misbehaviour and insolence towards his father.

## CHAP. IV.

## CHAP. IV.

(Verdict of the Petit Jury in justifiable and excusable Homicide.)

**H**AVING considered the cases of homicide justifiable and barely excusable, I will submit to the judgment of the learned what hath occurred to me touching the behaviour of the petit jury, and what verdict they are to give in these cases, and likewise upon criminal prosecutions in the cases of infancy and insanity.

SECT. 1. Though the jury may, and have been formerly directed in the cases of infancy and insanity to find the special matter, whereupon the court is to give judgment of acquittal, yet, *under the direction of the court*, they may find a general verdict of acquittal without this circuitry. Sect. 1.  
1 Hale 28 (36.)  
2 Hale 303.

This rule is founded in sound reason and substantial justice; for undoubtedly *crimen non contrahitur nisi voluntas nocendi intercedat*.

SECT. 2. In all cases of justifiable homicide, which have been already considered, the antient practice was to find the special matter, and to leave the court to give judgment of acquittal: but the later authorities agree, that in these cases the jury may, *under the direction of the court*, find a general verdict of acquittal: for, say the books, here is neither felony nor forfeiture. This rule is likewise founded in sound reason and substantial justice, for *crimen non contrahitur &c.* Sect. 2.  
3 Inst. 220.  
1 Hale 492.  
2 Hale 303, 304.

SECT. 3. In the case of homicide by misadventure, improperly stiled *chance-medley*, it hath been generally holden, that the jury ought not to find a general verdict of acquittal, but should find the special matter and submit the whole to the judgment of the court. In this rule the modern writers agree with the antient, unless *Hale*, for the reason I shall mention presently, may be excepted. For this two reasons have been assigned. Sect. 3.

1. The jury are judges of the mere matter of fact, and the court is to judge upon the special matter found by them,

CHAP. IV. them, whether the fact was done *per infortunium* or feloniously.

2. Though in this case no felony is committed, yet the party at common-law did forfeit his goods, and must expect the King's grace, under the statute of *Gloucester*, to restore them.

P. 255

I am very free to confess, that I am not at all satisfied with either of these reasons. That the matter of fact is the proper province of the jury I have already premised, and will never depart from it: but it was never said, that a jury may not, *under the direction of the court*, very properly find a general verdict comprehending both law and fact. Every general verdict, in whatsoever case it is given, doth so. It is now admitted, that they may, *under the direction of the court*, give a general verdict in all cases of justifiable homicide; and why not in the case of misadventure, a point seldom so complicated and embarrassed as the other?

2 Hale 302—  
304

Lord *Hale*, having at large considered the question touching the verdict as well in the cases of excusable as justifiable homicide, not, I doubt, with his usual precision, nor with perfect uniformity of sentiment, concludeth thus, "Notwithstanding this that I have said, where the matter itself appears *not to be felony* the prisoner upon not guilty pleaded may be found not "guilty without finding the special matter." I dare not say, that his Lordship *intended* to bring the case of misadventure, which he had mentioned before in this passage, and doth not now except, within this general rule; because in the passages cited above, and in others which might have been cited, he delivereth a contrary opinion: but certainly the rule, as laid down by him, is large enough to comprehend it; for in that case it is admitted on all hands, and cannot be gainsaid, that no felony is committed.

1 Hale 476.  
2 Hale 303.  
MS. Deaton.

General verdicts have been taken upon great consideration in cases of misadventure, particularly in *Pretty's* case, and in one at the *Old Bailey* in *December* 1689. But it must be observed, that in these cases the coroner's inquest had found the special matter and concluded *per infortunium*; which presentments the defendants confessed upon record, in order to their suing out their pardons, under the statute of *Gloucester*.

Whether

Whether that circumstance altered the case, *in point of substantial justice*, will be presently considered. CHAP. IV.

The second reason against a general verdict of acquittal in the case seemeth to be founded upon a gross mistake, *That at common-law he that killed a man per infortunium or se defendendo* was to be hanged and forfeit his goods; and that the statute of *Gloucester* though it saved his life, yet left his goods to the mercy of the Crown.

This doctrine is laid down in the year-book of *Ed. III.*, 21 Edw. III. 17 b. and in some other places; and some learned men \*, not sufficiently attending to the special import of the term MURDER, as it is used in the statute of *Marlbridge*, nor to the occasion of making that statute, have adopted it.

The statute of *Marlbridge* runneth thus, “Murdrum de 52 H. III. c. 26.  
“*cætero non adjudicetur coram justiciariis, ubi infortunium*  
“*tantummodo adjudicatum est, sed locum habeat murdrum de in-*  
“*terfectis per feloniam, & non aliter.*”

By the term *Murdrum*, as it standeth here, is not meant the offence, but an amerciament antiently exacted from the township, where a person was privately murdered, and the murderer not apprehended; or the dead body of an unknown person appearing to have been murdered happened to be found. This amerciament they called *Murdrum* †. (1 Hale 447, 448.)  
See Spelm. verb. Englesheria.

*Bracton*, who wrote before the statute of *Marlbridge*, spendeth a whole chapter upon the subject, and stateth a variety of cases, in which the township was excused from this burden. I will mention one, because it letteth us into the true sense of this statute, and also into the occasion of making it. “*Item de iis* De Coron. c. 15. § 6.

\* *Stanf. Prærog.* 45. *Placit. Cor.* 16. C. *Coke* on the stat. of *Marlbridge* c. 26. and on the stat. of *Gloucester* c. 9.

† In this sense the word is used in the charters of *Hen. I* and *K. Stephen*, which the reader will meet with in *Mr. Blackstone's* excellent discourse introductory to his *magna charta*.

The charter of *Hen. I.* runneth thus, “*Murdra etiam retro ab illo die quo in Regem coronatus fui OMNIA condono. Et ea quæ amodo facta fuerint iustis emendantur secundum legem Regis Edwardi.*”

*King Stephen's* is thus; “*Omnes exactiones & injustitias—funditus extirpo. Bonas leges & antiquas & iustas consuetudines in murdris & placitis—observabo & observari præcipio.*”

It cannot be understood in any other sense in antient charters of exemption to cities, towns and other aggregate bodies, “*Quinti sint de murdro.*” (*See 1 Moh 425.*)

## CHAP. IV.

"*qui mortui sunt per infortunium nullum erit murdrum, licet in quibusdam partibus DE CONSUETUDINE aliter observetur.*"

The reader here seeth, that at common-law no amerciament, to which they gave the name of *Murdrum*, was due in the case of death *per infortunium*, but that in some places a contrary custom had prevailed. The statute therefore did not correct the rigour of the common-law, as the learned authors just cited conceived. It's only view was to extend a rule of law, founded on natural justice, to those parts of the kingdom, where a contrary custom had prevailed. This clearly accounteth for the words *de cætero*, which, together with annexing a wrong idea to an equivocal expression, led those authors into their mistake.

It is difficult to conceive upon what principles the court delivered the opinion I have stated from the year-book of *Edw. III.*; since it would be a reproach to the justice of the kingdom to imagine, that the law ever proceeded upon a principle so repugnant to nature, to reason, and to the common-sense and feeling of mankind.

But the common-law never did lie under this reproach; for nothing is plainer than that no man was in danger of a capital punishment in case of death by misadventure or *se defendendo*, or in any case where the fact was not feloniously done.

- De Coron. c. 4.* *Bracon*, speaking of the case of homicide *se defendendo*, saith, "*Non tenetur ad pœnam homicidii;*" and of homicide *per infortunium*, "*Non imputatur ei;*" and again speaking of the same case, "*Abfolvi debet, quia crimen non contrahitur nisi voluntas nocendi intercedat;*" and he there compareth the case to that of an infant or madman, as standing clearly upon the same foot of reason and justice. *Fleta*, speaking of the case of self-defence, useth expressions of the like import; *Jussè*, saith he, *interficiit*. And even the statutes of *Marlbridge* and *Gloucester* plainly intimate, that at common-law no felony was supposed to be committed. The words of the former I have already cited; the latter expresseth the matter thus, "*Par misadventure ou soy defend, ou en autre manner SANS FELONY.*" and the pardons hereafter cited from the patent-rolls are express to the same purpose.

But



But it is said, that though the statute of *Gloucester* saved the life of the party, it left the forfeiture of his goods, incurred at common-law, to the mercy of the Crown. The mercy of the Crown, or the King's grace, or words of the like import serving to impress on the mind a due reverence for the regal character, no good subject can object to. This statute speaketh in still an higher strain. "The King shall take him to his grace, *if it please him*:" but it must not be concluded from this manner of expression, "*if it please him*," that the pardon, grounded on the statute, is a matter of mere grace, grantable or not at the pleasure of the Crown, though some of the older writers thought it was; for it is now a settled point, and long hath been, that the pardon issueth of course, and *ex debito justitiæ*, the requisites of the statute being performed. And the author of *Fleta*, who flourished about the time the statute was made, seemeth to consider the royal grace as a matter founded rather in common right than in mere will and pleasure; for speaking of the statute he saith, "*Et cum regi super facti veritate certioratur, gratiôsè dispensabit cum tali, salvo jure cuiuslibet.*"

Stanf. Prærog.  
45 b.

See Coke on the  
statute.

Lib. 1. c. 23.  
f. 15.

In my opinion the true scope and intent of this statute hath been greatly mistaken. It hath been considered as a law intitling the subject to the grace of the Crown in cases of homicide by misadventure or *se defendendo*, to which he was not before intitled: but the fact appeareth to me to be quite otherwise; for the subject had in these cases the benefit of the royal grace long before the making of this statute; as appeareth by many antient charters of pardon\*, in which the King reciting that it appeared to him, sometimes upon the representation of persons *fide dignorum*, at other times by the certificate of the sheriff and coroners of the county where the fact was committed, that it was done in the necessary defence of the party, & *non per feloniam aut malitiam excogitatam*, concludeth, "*Nos ergo pietate moti perdonavimus prædicto A. B. scilicet pacis nostræ, quæ ad nos pertinet, pro morte prædictâ, & firmam*

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\* See the patent rolls in the time of H. III. and Edw. I. anterior to the statute of *Gloucester*.

CHAP. IV. "*pacem ei inde concedimus; ita tamen quòd stet rectò in curià si aliquis versus eam inde loqui voluerit.*"

This last clause saved to the relations of the party deceased their remedy by way of appeal of death, or, to speak more properly, recognized the subject's right to this method of prosecution; which is, I presume, what *Fleta* in the passage just cited meaneth by the words, *salvo jure cujuslibet*.

P. 184, 264.

(Bract. L. 3.

l. 1. c. 9.

3 Rym. 63.

4 Rym. 244.

7 Rym. 158,  
159.)

3 Edw. III. c. 2.

The royal grace in these cases seemeth to me to be founded in the benignity of the common-law, and to have been specially regarded in framing the coronation-oath, which was nothing more than a recognition of the constitutional rights of the subject and a solemn engagement on the part of the Crown to maintain them. The words, as the oath standeth at present, I have already cited: and words of the like import were inserted in that antiently taken by our Kings, importing that mercy as well as justice is one of the constitutional attributes of the Crown. And I the more readily give into this opinion, by reason of the provision made by the statute of *Edw. III.* when the frequency of pardons from the ease with which they were obtained was considered as a publick mischief: "No pardon shall be granted for manslaughter—and other trespasses against the peace, but where the King may do it by his oath, viz. where a man slayeth another in his own defence or by misfortune." These words \* expressly referring to the coronation-oath seem to imply, that in the excepted cases mercy was due of common right. Sure I am it is founded in natural justice.

27 Edw. III.  
st. 1. c. 2.

But the mercy of the Crown in cases of homicide was liable to great abuse. The King was sometimes misled by a false or partial representation of facts, against which abuse the statute of 27 *Edw. III.* was levelled. The abuse the statute of *Gloucester* probably had in contemplation was the careless or partial manner in which the sheriff and coroners executed the writ *de odio & atia*.

C. 26.

This writ was founded on the common-law, and was rendered more effectual by the great charter, which provided, that it should issue *gratis* and of course without fine to the

\* See in 4 *Edw. III.* c. 13. 10 *Edw. III.* st. 1. c. 2. 14 *Edw. III.* st. 1. c. 15. words of the like import referring to the coronation-oath.

King. Upon the return of this writ, if it appeared, either that the party was acquitted by the inquest, or that the fact was done by misadventure or *se defendendo*, the writ *de ponenda in ballium* issued of COMMON RIGHT. But the sheriff and coroners were no longer thought worthy of a trust of this high importance, which they had probably abused; and therefore in order to vest it in the justices itinerant, who generally were at the head of the profession, and with that view alone, as I conceive, was this branch of the statute made: not to intitle the subject to the royal grace in cases in which he was not admissible to it before, as hath been imagined; but to remedy some inconveniences, which had been seen and felt in the method of admitting him to it.

CHAP. IV.

See Coke on  
Mag. Ch. c. 26.

To that end the statute enacteth, "That no writ shall be granted out of the Chancery for the death of a man to inquire whether a man did kill another by misfortune or *se defendendo*, or in other manner *without felony*; but he shall be put in prison until the coming of the justices errants or justices assigned to deliver the gaol; and if it be found by the country, that he did it in his own defence or by misadventure, then by the report of the justices to the King, the King shall take him to his grace, if it please him."

Stat. Glouc. c. 9.

This was plainly pointed at the writ *de odio & atia*, and abolished it; and in the room of the return made to that writ by the sheriff and coroners substituted the certificate of the justices in Eyre: and this, I apprehend, was all it did in regard to that matter.

Lord Coke indeed doth say, that the writ *de odio & atia* was taken away by the 28 *Edu. III.* but in his comment on the statute now under consideration he admitteth, that it was restrained by this statute, and another remedy provided; and whoever will read the 28 *Edu. III.* with attention will see, that that act was levelled at an abuse of quite another kind.

On Mag. Ch.  
c. 26.

C. 9.

In treating this subject I have, in conformity to the language of writers who have gone before me, and to the stile of the statute of Gloucester, spoken of the cases of homicide *per infortunium* or *se defendendo* as cases standing in need of the grace of the Crown, though probably intitled to it of common

CHAP. IV.

P. 52.

Fitz. Cor. 287.

mon right. That persons who in either case had been unhappily instrumental in homicide did sue out charters of pardon, as well before as since the statute, cannot be denied. What was the peculiar object of the royal grace in these cases is not, I confess, so clear to me. I am satisfied, that the life of the party was never in danger, and consequently as to life he could not be considered as an object of royal clemency, and standing in need of a pardon. It hath been generally thought, that at common-law the party incurred a forfeiture of *all his chattels*; and *Kelyng* hath given us a short note of a case from *Fitzherbert* in the 3 *Edw. III.*, which, *as he citeth it*, would lead one to think, that the law at that time undoubtedly was so. His words are, "The jurors were amerced for putting an undervalue upon the goods of a man who killed another in his own defence." This case so cited strongly implieth, that in every case of homicide *se defendendo* the party forfeited *all his goods*; otherwise why was the jury charged with the value of them, or amerced for their misbehaviour with regard to the appraisement? But *Fitzherbert* goeth much farther into the real state of the case, and at the same time letteth us, I conceive, into the true ground of the forfeiture. The defendant after he had killed the assailant fled for it, "Ideo," saith the book, "*catalla ejus confiscantur pro fugâ.*"

*Fitzherbert* hath reported some other cases, where the parties incurring this forfeiture had fled from justice; and in the case standing next before that cited by *Kelyng*, and happening in the same year, the reporter, after saying that the party was remanded to prison *ad gratiam regis expectandâ*, addeth, "*Et postea compertum est per rotulos coronatorum quod prædictus G. fugit; ideo catalla ejus confiscantur pro fugâ:*" he was remanded to prison, as the practice then was, appearing then to be intitled to the benefit of the statute of *Gloucester*; but it afterwards appearing that he had fled from justice, his goods were therefore, for his flight, confiscated.

Flight, it is well known, at this day induceth a forfeiture of goods, though the party should be wholly acquitted of the fact; and by the antient law a felon killed in the pursuit upon hue.

hue and cry forfeited in like manner, "*Quia*," as the old books have it, "*paci regis reddere se recusavit. Quia per legem non permisit se iusticiari.*"

CHAP. IV.  
Fitz. Cor. pl.  
288, 289, 290.

I submit it to the consideration of the learned, whether in cases of homicide *per infortunium* or *se defendendo* a forfeiture of the whole was ever incurred; for in the early ages nearest the conquest, when our law was, as it were, in a state of infancy, and had not received the improvements it did during the reign of *Edw. I.* and in some succeeding reigns, the manslayer paid to the Crown by way of compensation for the loss of a subject a mulct or fine, sometimes in money, at other times in horses, hounds, hawks, and other valuable effects. This I call a mulct or fine, unless we may suppose, that those payments were made and accepted in lieu of and as a composition for the whole, which I leave to farther consideration \*.

It is well known to the learned, that the *Anglo-Saxons*, in conformity to a custom they and other nations of *German* extraction derived from their ancestors, in case of homicide contented themselves with a pecuniary compensation, which they called the *wergild*, the price of blood. This, when it came to be ascertained by law, was estimated in proportion to the rank and publick character of the deceased, the Crown in consideration of the loss of a subject, and the Lord for the loss of his vassal coming in for a share of it with the family, which likewise had suffered a loss in the death of its chief.

See Tacitus de  
Moribus Ger-  
manorum, c. 12.

The community was supposed to have an interest, as it really had, in the life of every member; and therefore the King, as *caput reipublicæ*, might exact a certain mulct or fine in cases of homicide, though merely casual †. Upon this principle deodands became due. The weapon with which the party was slain by another was a deodand. Irrational creatures, and even inanimate beings, which, without the intervention of human means, contributed to the death were deodands,

\* See in *Madax's History of the Exchequer*, c. 14. §. 6. some traces of these payments.

† See the *Saxon* laws throughout, with the laws of the conqueror and *Hen. I.* and the glossaries. Verb. *Freda*, *Wergild*, *Manbote*.

And see *Montesquieu's Spirit of Laws*. Lib. 30. c. 19, 20. the like usages among the *Franks* and other nations of *German* extraction.

CHAP. IV. and are so to this day : and upon the same principle the Crown shared with the family in the amerciamment called *murdrum* already mentioned.

But I will travel no farther in a dark and almost untrodden path.

I have neither leisure nor inclination to enter deeply into the search of antiquity touching these matters. The few things I have thrown out I offer as probable conjectures, hints which possibly may afford some little light to those who have more leisure and better health for such inquiries.

For, I think, it is now become a matter rather of historical amusement than of real importance to inquire, whether any forfeiture in the case of homicide *se defendendo* or *per infortunium* was incurred at common-law or not ; since the statute of *Gloucester* intitleth the party to the royal grace and hath purged the forfeiture *ab initio*, if any forfeiture was ever incurred.

P. 279. I therefore think those judges who have taken general verdicts of acquittal in plain cases of death *per infortunium* (justifiable self-defence hath been already spoken to) have not been to blame. They have, to say the worst, deviated from antient practice in favour of innocence, and have prevented an expence of time and money, with which an application to the great seal, though in a matter of course, as this undoubtedly is, must be constantly attended.

*Nulli vendemus, nulli negabimus, aut differemus rectum aut justitiam.*

And, if it deserveth the name of a deviation, it is far short of what is constantly practised at an admiralty-sessions under the 28 H. VIII. with regard to offences not ousted of clergy by particular statutes \*, which, had they been committed at land, would have been intitled to clergy. In these cases the (See Moo. 726.) jury is constantly directed to acquit the prisoner ; because the marine-law doth not allow of clergy in any case : and therefore in an indictment for murder on the high-sea, if the fact

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\* Statutes ousting clergy are 11 & 12 H. III. c. 7. 4 G. I. c. 11. 8 G. I. c. 24, and perhaps some others.

cometh out upon evidence to be no more than manslaughter, supposing it to have been committed at land, the prisoner is constantly acquitted.

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SECT. 4. I am not so clear with regard to that species of self-defence, which I have already considered as barely excusable. *Bracton* and *Fleta* indeed, in the passages I have cited, speak of self-defence in general terms, not accurately distinguishing between that which is justifiable and that which is barely excusable: but in the then infant-state of our law some inaccuracy of expression and a want of due precision in the arrangement of ideas may be expected, and ought to be candidly excused; though it must be confessed, that in the scale of sound reason and substantial justice the cases widely differ. In the former the party is entirely innocent, he hath gone no farther than nature leadeth, no farther than duty, founded on the great law of self-preservation, will carry the wisest and the best of men. In the latter he may be considered as blameworthy, having by his own indiscretion and inordinate heat brought upon himself the necessity under which he excuseth the fact; and though not a felon, yet, in the estimation of the law, which looketh with a jealous eye on every action which tendeth to bloodshed and the disturbance of the peace of society, far from an innocent man. In short, as I have already observed, his case is sometimes attended with circumstances so bordering upon and not easily distinguishable from that species of felonious homicide which we call manslaughter, that he may with propriety enough be considered as an object of the King's grace within the restrictions of the statute of *Gloucester*, and consequently not intitled to a general verdict of acquittal.

SECT. 4.

P. 276.

## CHAP. V.

## CHAP. V.

## Manslaughter.

P. 255.

**I**NOW proceed to that species of felonious homicide which we call manslaughter, which, as I before observed, the benignity of our law, as it standeth at present, imputeth to human infirmity; to infirmity, which though in the eye of the law criminal, yet is considered as incident to the frailty of the human frame.

P. 258 &amp;c.

P. 275 &amp;c.

The cases falling under the denomination of manslaughter, where death ensueth from actions in themselves unlawful, but not proceeding from a felonious intention, or from actions in themselves lawful, but done without due care and circumspection for preventing mischief, have been already considered under the title of accidental death; and the distinction between manslaughter and excusable self-defence hath been attempted in it's proper place.

The cases falling under the head of manslaughter, which most frequently occur, are those where death ensueth upon a sudden affray and in heat of blood, upon some provocation given or conceived.

P. 255.

I have already premised, that whoever would shelter himself under the plea of provocation must prove his case to the satisfaction of his jury. The presumption of law is against him, till that presumption is repelled by contrary evidence. What degree of provocation, and under what circumstances heat of blood, the *furor brevis*, will or will not avail the defendant is now to be considered.

Sect. 1.  
Words &c not  
a sufficient  
provocation.  
(Kel. 55.  
1 Hale 456.)

SECT. I. Words of reproach, how grievous soever, are not a provocation sufficient to free the party killing from the guilt of murder. Nor are indecent provoking actions or gestures expressive of contempt or reproach, without an assault upon the person.

This rule will, I conceive, govern every case where the party killing upon such provocation maketh use of a deadly weapon, or otherwise manifesteth an intention to kill, or to do



do some great bodily harm : but if he had given the other a box on the ear, or had struck him with a stick or other weapon *not likely to kill, and had unluckily and against his intention* killed, it had been but manslaughter. CHAP. V.  
Kel. 130, 131.

The difference between the cases is plainly this. In the former the *malitia*, the wicked vindictive disposition already mentioned, evidently appeareth : in the latter it is as evidently wanting. The party in the first transport of his passion intended to chastise for a piece of insolence, which few spirits can bear. In this case the benignity of the law interposeth in favour of human frailty ; in the other it's justice regardeth and punisheth the apparent malignity of the heart.

SECT. 2. And it ought to be remembered, that in all other cases of homicide upon slight provocation, if it may be reasonably collected from the weapon made use of, or from any other circumstance, that the party intended to kill, or to do some great bodily harm, such homicide will be murder. The mischief done is irreparable, and the outrage is considered as flowing rather from brutal rage or diabolical malignity than from human frailty ; and it is to human frailty, and to that alone, the law indulgeth in every case of felonious homicide. Sect. 2.  
Homicide on  
slight provoca-  
tion, if intend-  
ed, is murder.

A few instances may serve for illustration.

*A.* finding a trespasser upon his land in the first transport of his passion beateth him, and unluckily happeneth to kill ; this hath been holden to be manslaughter. But it must be understood, that he beat him, not with a mischievous intention, but merely to chastise for the trespass, and to deter him from committing the like ; for if he had knocked his brains out with a bill or hedgestake, or had given him an outrageous beating with an ordinary cudgel beyond the bounds of a sudden resentment, whereof he had died, it had been murder. For these circumstances are some of the genuine symptoms of the *mala mens*, the heart bent upon mischief, which, as I have already shewn, enter into the true notion of malice in the legal sense of the word. 1 Hale 473.  
Kel. 132.  
P. 256.

CHAP. V.  
Cro. Car. 131.  
Palm. 45.  
Jones (W.) 198.

A parker found a boy stealing wood in his master's ground, he bound him to his horse's tail and beat him. The horse took fright and ran away, and dragged the boy on the ground, so that he died. This was holden to be murder \*; for it was a deliberate act and favoured of cruelty.

Old Bailey, Apr.  
1704. MSS.  
Tracy and Den-  
ton.

There being an affray in the street, one *Stedman* a foot-soldier ran hastily towards the combatants. A woman seeing him run in that manner cried out, "You will not murder the man will you?" *Stedman* replied, "What is that to you, you bitch?" The woman thereupon gave him a box on the ear, and *Stedman* struck her on the breast with the pommel of his sword. The woman then fled, and *Stedman* pursuing her stabbed her in the back. *Holt* was at first of opinion, that this was murder, *a single box on the ear from a woman not being a sufficient provocation to kill in this manner, after he had given her a blow in return for the box on the ear*; and it was proposed to have the matter found specially: but it afterwards appearing in the progress of the trial, that the woman struck the soldier in the face with an iron patten, and drew a great deal of blood, it was holden clearly to be no more than manslaughter.

The smart of the man's wound, and the effusion of blood might possibly keep his indignation boiling to the moment of the fact.

Stra. 499.  
R. v. Tranter  
and Reason.

*Mr. Lutterel* being arrested for a small debt prevailed on one of the officers to go with him to his lodgings, while the other was sent to fetch the attorney's bill, in order, as *Lutterel* pretended, to have the debt and costs paid. Words arose at the lodgings about *civility-money*, which *Lutterel* refused to give; and he went up stairs pretending to fetch money for the payment of the debt and costs, leaving the officer below. He soon returned with a brace of loaded pistols in his bosom, which, at the importunity of his servant, he laid down on the table saying, *He did not intend to hurt the officers, but he would not be ill-*

P. 262.

\* The cases of immoderate correction, mentioned already under the head of accidental death, carry this rule much farther than these do; for correction with moderation is certainly lawful: but in these cases the least blow would have been unjustifiable.

*used.*

*used.* The officer, who had been sent for the attorney's bill, soon returned to his companion at the lodgings; and words of anger arising *Lutterel* struck one of the officers on the face with a walking-cane, and drew a little blood. Whereupon both of them fell upon him, one stabbed him *in nine places, he on the while on the ground begging for mercy and unable to resist them*; and one of them fired one of the pistols at him *while on the ground*, and gave him his death's wound. This is reported to have been holden manslaughter *by reason of the first assault with the cane.*

This is the case, as reported by Sir *John Strange*; and an extraordinary case it is, that all these circumstances of aggravation, two to one, he helpless and, on the ground begging for mercy, stabbed in nine places and then dispatched with a pistol; that all these circumstances, plain indications of a deadly revenge or diabolical fury, should not outweigh a slight stroke with a cane.

See Holt's opinion in the last case.

But in the printed trial there are some circumstances stated, which are entirely dropped, or very slightly mentioned by the reporter.

6 St. Tri. 195.

1. Mr. *Lutterel* had a sword by his side, which, after the affray was over, was found drawn and broken. How that happened did not appear in evidence; for part of the affray was at a time when no witness was present, no-body spoke to the whole.

2. When *Lutterel* laid the pistols on the table he declared, that he brought them down, *because he would not be forced out of his lodgings.*

3. He threatened the officers several times.

4. One of the officers appeared to have been wounded in the hand by a pistol-shot, (for both the pistols were discharged in the affray,) and slightly on the wrist by some sharp-pointed weapon: and the other was slightly wounded in the hand by a like weapon.

5. The evidence touching *Lutterel's* begging for mercy was not, that he was on the ground *begging for mercy*; but that on the ground he held up his hands *as if he was begging for mercy.*

The chief-justice directed the jury, that if they believed Mr. *Lutterel* endeavoured to rescue himself, which he seems

CHAP. V. to think was the case, and very probably was the case, it would be justifiable homicide in the officers. However, as Mr. *Lutterel* gave the first blow *accompanied with menaces to the officers, and the circumstance of producing loaded pistols to prevent their taking him from his lodgings*, which it would have been their duty to have done, if the debt had not been paid or bail given, he declared IT COULD BE NO MORE than *man-slaughter*.

This direction of the chief-justice the reporter hath totally omitted; and therefore I have taken the liberty to state the case more largely than otherwise I should have done; and I cannot help saying, that the circumstances omitted in the report are too material, and enter too far into the true merits of the case to have been dropped by a gentleman of Sir *John Strange's* abilities and known candour, if he had not been over-studious of brevity.

Imperfect reports of facts and circumstances, especially in cases where every circumstance weigheth *something* in the scale of justice, are the bane of all science that dependeth upon the precedents and examples of former times.

12 Rep. 87.

1 Hale 453.

I have always thought *Rowley's* case a very extraordinary one, as it is reported by *Coke*, from whom *Hale* cites it. The son fights with another boy and is beaten; he runs home to his father all-bloody; the father takes a staff, runs three quarters of a mile, and beats the other boy, who dieth of this beating. This is said to have been ruled manslaughter, *because done in sudden heat and passion*.

Surely the provocation was not very grievous. The boy had fought with one who happened to be an over-match for him, and was worsted; a disaster slight enough, and very frequent among boys.

If upon this provocation the father, after running three quarters of a mile, had set his strength against the child, had dispatched him with an hedge-stake or any other deadly weapon, or by repeated blows with his cudgel, it must, in my opinion, have been murder; since any of these circumstances would have been a plain indication of the *malitia*, the mischievous vindictive motive before explained; but with regard to these circumstances,

circumstances, with what weapon or to what degree the child was beaten, *Coke* is totally silent. CHAP. V.

But *Croke* setteth the case in a much clearer light, and at the same time leadeth his readers into the true grounds of the judgment. His words are, "*Rowly struck the child with a small cudgel\*, of which stroke he afterwards died.*" Cro. Jac. 296.

I think it may be fairly collected from *Croke's* manner of speaking, [and *Godbolt's* report,] that the accident happened by a single stroke with a cudgel not likely to destroy, and that death did not immediately ensue. The stroke was given in heat of blood, and not with any of the circumstances which import the malitia, the malignity of heart attending the fact already explained, and therefore manslaughter. I observe, that Lord *Raymond* layeth great stress on this circumstance; *that the stroke was with a cudgel not likely to kill.* Ld. Raym. 1498.

SECT. 3. The rule laid down in the first section will not hold in cases where from words or actions of reproach or contempt, or indeed upon any other sudden provocation, the parties come to blows, *no undue advantage being sought or taken on either side.* Sect. 3. Parties fight on a sudden quarrel.

*A.* useth provoking language or behaviour towards *B.* *B.* striketh him, upon which a combat ensueth, in which *A.* is killed. This is holden to be manslaughter; for it was a sudden affray and they fought upon equal terms; and in such combats upon sudden quarrels it mattereth not who gave the first blow. 1 Hale 456.

But if *B.* had drawn his sword and made a pass at *A.*, his sword then undrawn, and thereupon *A.* had drawn and a combat had ensued, in which *A.* had been killed, this would have been murder; for *B.* by making his pass, his adversary's sword undrawn, shewed, that he sought his blood; and *A.*'s endeavour to defend himself, which he had a right to do, will not excuse *B.*: but if *B.* had first drawn and forborne till his adversary had drawn too, it had been no more than manslaughter. Kel. 61. Ld. Raym. 1489. Kel. 130. Ld. Raym. 1493.

*Maitvridge*, whose case hath been already mentioned upon another occasion, upon words of anger threw a bottle with P. 274.

\* *Godbolt* 182 calleth it a *Roll*, meaning, I suppose, a small wand.

CHAP. V.

*great force* at the head of Mr. *Cope*; and *immediately drew his sword*; Mr. *Cope* returned a bottle at the head of *Mawgridge*, and wounded him. Whereupon *Mawgridge* stabbed *Cope*. This was ruled to be murder; for *Mawgridge* in throwing the bottle shewed an intention to do some great mischief; and his drawing immediately shewed, that he intended to follow his blow; and it was lawful for Mr. *Cope* being so assaulted to return the bottle \*. The judgment in this case was holden to be good law by all the judges of *England* at a conference in the case of Major *Oneby*.

Ld. Raym. 1489.  
(Stra. 771.)

To what I have offered with regard to sudden rencounters let me add, that the blood, already too much heated, kindleth afresh at every pafs or blow; and in the tumult of the passions, in which *mere instinct, self-preservation*, hath no inconsiderable share, the voice of reason is not heard: and therefore the law in condescension to the infirmities of flesh and blood hath extenuated the offence.

Sect. 4.  
Homicide after  
time for passion  
to subside.

SECT. 4. But in these, and indeed in every other case of homicide upon provocation, how great soever it be, if there is sufficient time for passion to subside, and for reason to interpose, such homicide will be murder.

(1 Hale 486.  
1 Vent. 158.  
Sir T. Raym.,  
212.)

*A.* findeth a man in the act of adultery with his wife, and in the first transport of passion killeth him; this is no more than manslaughter: but had he killed the adulterer deliberately and upon revenge *after the fact and sufficient cooling-time*, it had been undoubtedly murder. For let it be observed, that in all possible cases deliberate homicide upon a principle of revenge is murder. No man under the protection of the law is to be the avenger of his own wrongs. If they are of such a nature for which the laws of society will give him an adequate remedy, thither he ought to resort: but, be they of what nature soever, he ought to bear his lot with patience and remember, *That vengeance belongeth only to the Most High*,

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\* See Lord Holt's report of *Mawgridge's* case *Kel.* 119. The learned judge in this case, after a short introductory discourse wherein I cannot totally agree with him, entereth with great learning and sound reason into the point upon which the case turned. He doth so likewise in the case of the King and *Plummer*,

SECT.

SECT. 5. Upon this principle, deliberate duelling, if death ensue, is in the eye of the law murder; for duels are generally founded in deep revenge; and though a person should be drawn into a duel, not upon a motive so criminal, but merely upon the punctilio of what the *fencers* falsely call honour, that will not excuse; for he that deliberately seeketh the blood of another upon a private quarrel acteth in defiance of all laws human and divine, whatever his motive may be.

CHAP. V.  
SECT. 5.  
Duelling.  
(1 Hale 443.  
452. 453.)

But if, as I said before, upon a sudden quarrel the parties fight upon the spot, or if they presently fetch their weapons and go into the field and fight, and one of them falleth, it will be but manslaughter; because it may be presumed the blood never cooled.

It will be otherwise if they appoint to fight the next day, or even upon the same day at such an interval as that the passion might have subsided: or if from any circumstances attending the case it may be reasonably concluded, that their judgment had actually controuled the first transports of passion before they engaged. The same rule will hold, if after a quarrel they fall into other discourse or diversions, and continue so engaged a reasonable time for cooling.

Kel. 27.

Oneby's case.  
Stra. 773. Ld.  
Raym. 1489,  
1493 &c.

## CHAP. VI.

### Of the Statute of Stabbing.

THAT particular species of manslaughter which is ousted of clergy by the act of 1 Jac. I. commonly called *The Statute of Stabbing*, cometh now in course to be considered.

This statute was made at a critical time, and, as tradition hath it, upon a very special occasion. It is supposed to have been principally intended to put an effectual stop to outrages then frequently committed by persons of inflammable spirits and deep resentment; who, wearing short daggers under their cloaths, were too well prepared to do quick

Far. 133.  
Ld. Raym.  
845.

1 Jac. I. c. 8.

CHAP. VI. quick and effectual execution upon provocations extremely slight.

Sect. 1.  
Declaratory of  
the common-  
law. Kel. 55.  
(1 Hale 456.)

SECT. 1. It was agreed by the judges in Lord *Morley's* case, that this statute is declaratory of the common-law, and was made for preventing the inconveniences arising from the forwardness or compassion of juries; who were apt to consider that to be a provocation for extenuating murder, which in law was not. Whether it was merely a declaratory statute or not, I will not take upon me to determine: but certain it is, that though the words descriptive of the offence are very general, probably *in terrorem*, yet in the construction of the statute the circumstances which at common-law will serve to justify, excuse, or alleviate in a charge of murder, have always had their due weight in prosecutions grounded on the statute.

The words are, "That if any person shall *stab* or *thrust* any person that hath not then any weapon *drawn*, or that hath not then first stricken the party killing, and the person so stabbed or thrust die in six months; except in cases of self-defence, misfortune, or for preserving the peace or chastizing his child or servant, such offender shall &c."

But general as the words are, yet cases coming within the letter of the act, and not covered by any of the exceptions, have very rightly been adjudged not to be within the meaning of it, the justice or benignity of the law over-ruling the rigorous penning of the statute.

I will by way of illustration mention a few cases, some of which have been already cited to other purposes.

P. 296.

The case of an adulterer stabbed by the husband in the act of adultery lately cited is not within the act: it is manslaughter at common-law; for the provocation is greater than flesh and blood, in the first transport of passion, can bear.

Str. 469.

A man is assaulted by thieves in his house, the thieves having no weapon drawn nor having struck him; he stabbeth one of them; this is not within the act, it is justifiable homicide.

1 Hale 470.

An officer pushed abruptly and violently into a gentleman's chamber early in the morning in order to arrest him, *not telling his business nor using words of arrest*: the gentleman, *not knowing*



*knowing that he was an officer*, under the first surprize took down a sword that hung in the chamber and stabbed him. It was ruled manslaughter at common-law, though the defendant was indicted on the statute, and the officer had no weapon drawn, nor had he struck the defendant; who not knowing the officer's business might, from his behaviour, reasonably conclude that he came to rob or murder him.

Upon an outcry of thieves in the night-time a person who was concealed in a closet, but no thief, was, in the hurry and surprize the family was under, stabbed in the dark. This was holden to be an innocent mistake, and ruled chance-medley.

1 Hale 41, 474.  
Cro. Car. 538.  
Jones (W.) 419.

Possibly it might have been better ruled manslaughter at common-law, due circumspection not having been used; but it was not manslaughter within the statute.

Cases of this kind are very numerous. Many of them have been already stated to other purposes under the head of justifiable or excusable homicide; and more there are which cannot have escaped the observation of any attentive reader. In all such cases the justice or benignity of the common-law hath overruled the rigour of the statute.

SECT. 2. A prisoner whose case may be brought within the letter of the act commonly is arraigned upon two indictments, one at common-law for murder, the other upon the statute; and if it cometh out in evidence, that the fact was either justifiable or amounted barely to manslaughter at common-law, it hath been rarely known, that such person hath been convicted of manslaughter upon the statute.

Sect. 2.  
Two indictments usual.

Hard indeed it would be should he be so convicted: for, if the tradition I hinted at above is to be depended on, this is one of those acts which, to borrow an expression from Lord Bacon, was made *upon the spur of the times*; whereas the rules of the common-law, in cases of this kind, may be considered as the result of the wisdom and experience of many ages.

Let me add, that if the outrages at which the statute was levelled had been prosecuted with due vigour and proper severity upon

CHAP. VI. upon the foot of common-law, I doubt not an end would soon have been put to them, without incumbering our books with a special act for that purpose, and a variety of questions touching the true extent of it. This observation will hold with regard to many of our penal statutes, made upon special and pressing occasions, and favouring rankly of the times.

After what I have said it may not be thought extremely necessary to enter minutely into the circumstances which will bring particular cases within the statute, or take them out of it: but something very briefly shall be said.

SECT. 3.  
Stab or thrust.  
1 Hale 470.

SECT. 3. The statute in describing the offence saith, "Every person that shall *stab or thrust*." Under these words shooting with any sort of fire-arms, or thrusting with a staff or any other blunt weapon, have been brought within the act. The case of thrusting with a blunt weapon must be supposed to have been in the contemplation of the legislature; otherwise it will not be easy to account for the exception with regard to the correction of children or servants.

1 Hale 469.

The case of shooting with fire-arms will govern the cases of sending an arrow out of a bow or a stone from a sling, or using any device of that kind *bolden in the hand of the party at the instant of discharging it*: but throwing at a distance and wounding the party, whereby death ensueth, the weapon, be it what it may, *being delivered out of the hand* \* at the time the stroke was given, hath not been thought with strict propriety to come under the notion of stabbing or thrusting.

SECT. 4.  
What a weapon drawn.

SECT. 4. The statute hath likewise these words farther descriptive of the offence, "Every person that shall stab or thrust any person that hath not then any weapon *drawn*, or that hath not then *first* stricken &c."

1 Hale 470.  
Godb. 154.

An ordinary cudgel, or other thing proper for defence or annoyance in the hand of the party hath been considered as a

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\* *Holt in Kel* 131. and by the court in *Newman's case* at the *Old Bailey* in *Ob.* 8 *An.* where the point of a sword was thrown at 20 yards distance. *MSS. Denton and Chapple.*

weapon drawn, so as to take the case out of the statute; though the words *a weapon drawn* seem rather to import a sword, or other weapon of that kind *drawn out of the scabbard*. It would sound extremely harsh to say, that a sword in the scabbard is a weapon drawn within the meaning of the act; and yet, I presume, there are some swords still remaining, which probably have not been *drawn* since the restoration, as well fitted for defence or annoyance as an ordinary cudgel. But the judges have wisely holden a strict hand over this statute. They did so very remarkably in the cases where it hath been holden, that persons present aiding and abetting, though at common-law principals in the manslaughter, are not within the statute, so as to be ousted of clergy.

Aleyn 43.  
1 Hale 468.  
Salk. 542.  
(2 Hale 344.  
Styler 86.)

SECT. 5. The judges were once divided upon the construction of the word *then*; "The party killed not having *then* any weapon drawn." The point in debate was, whether the word *then* was to be confined to *the instant the stab was given*, or whether it related to the whole time of the combat. But, as I do not find that this point received any judicial determination, I leave it to the men of more leisure and refinement.

Sect. 5.  
Meaning of the  
words *then* and  
*first* in the sta-  
tute.  
3 Lev. 255.

In another case, a question arose upon the construction of the word *first* in the statute: "The person killed not having *first* stricken the person killing." Eleven of the judges held, that the words, "not having *first* stricken," meant, not having given *the first blow in the affray*. *Richardson* singly was of opinion, that the meaning of the words was, not having struck *before the mortal wound was given*. The major vote however prevailed; but, in the opinion of *Holt*, against the natural order of the words and the obvious meaning of the act. The arrangement of the words, as they stand in the statute, seemeth to have been inverted, and a construction the legislature never dreamt of extorted from them.

Jones (W.) 340.

Skin. 668.

These are some of the questions upon which the ingenuity of learned men hath been employed in the construction of this statute. But wherever the defendant is indicted at common-law and also upon the statute, the question most worthy of litigation would, in my opinion, be, Is the fact upon evidence murder

CHAP. VI. murder at common-law, or is it not? Especially if the statute was declaratory of the common-law, as, according to the passage already cited from *Kelyng*, it was resolved to be.

One general rule however may, as I conceive, be safely laid down, That in all cases of doubt and difficulty upon the construction of the statute the benignity of the common-law ought to turn the scale.

## CHAP. VII.

(Of the Distinction between Manslaughter and Murder according to old Writers, and of the Benefit of Clergy.)

BEFORE I quit the subject of manslaughter, I will submit to consideration a few things which have occurred to me touching the distinction between that offence and murder in the light our oldest writers considered those offences; and how far later statutes have introduced the material distinction between those offences which at present is established.

Vid. Bract. cap. de Muro, 134 b.

P. 281.

Vid. Bract. cap. de Homicidio, 121 a.

The distinction between murder and manslaughter, as it is stated by our oldest writers, seemeth to have been in their time merely nominal. By the one they meant an insidious secret assassination, *occulta occiso, nullo sciente aut vidente*, as they express themselves. And homicide under these circumstances, if the offender was not apprehended, subjected the township, as I have already observed, to the americiament, to which they gave the name of *Murdrum*.

Every other species of felonious homicide they called simply *homicidium nequiter & in feloniam factum*. But both offences with regard to the consequences of a conviction were the same, both capital; unless the privilege of clergy interposed, and when it did, both were treated alike.

The legal notion of murder in contra-distinction to manslaughter was afterwards enlarged, and took in every species of homicide, whether openly or privily committed, if attended with circumstances indicating a preconceived malice in the large sense of that term, which I have already stated and explained; or, to borrow a term from the Scotch law, "Slaughter of forethought felony."

Stanford,

*Stanford*, the clearest and best writer on the Crown-law before *Hale*, stateth the old rule from *Bracton*; but addeth, that the enlarged idea, taking in every species of homicide with malice prepened, had long obtained.

CHAP. VII.  
Stanf. c. 10.  
Id. l. 18. B.

How long it had obtained, it is difficult to determine with precision; and I think it a point not worthy of much investigation. It had certainly obtained long before *Stanford's* time: for though, as I observed at the entrance into this discourse, the antient precedents and writers on our law do not make use of the term homicide *upon malice forethought* in contra-distinction to simple felonious homicide unattended with that circumstance; yet it is certain, that the term, and also the distinction between the one offence and the other founded in the circumstance of malice was well known and understood at or very near the time those writers flourished\*.

P. 256.

The acts † of general pardon from the 50 *Edw. III.* to this time constantly and uniformly except murder of *malice prepened*, or in words tantamount, corresponding exactly with our present notion of that offence.

Under these acts, manslaughter not being excepted was always understood to be pardoned.

Here was a real distinction, though temporary and occasional, established between the offences of murder and simple felonious homicide; which was certainly founded on the supposed malignity or non-malignity of the heart at the time the fact was committed. In one case the mercy of the Crown interposed, in the other the offender was left open to the justice of the law.

The statute of *Rich. II.* likewise presupposeth the legal distinction as well known in those days; and, as far as it goeth, establisheth a real and lasting difference between the offences. It enacteth, "That no pardon shall be allowed for murder or for the death of a man slain by *await, assault, or malice prepened*—unless the same murder &c be specified in the charter; and if in the charter it be not so specified, the

13 Rich. II.  
St. 2. c. 1.

\* See the patent rolls already cited, many pardons for homicide under various circumstances reciting that the facts were committed *non per feloniam aut ex cogitatum malitiam*. P. 283.

† See the acts in *Rafal* or any edition before 1618, when *Pulton's* collection, omitting temporary acts and acts supposed to be repealed or obsolete, was published.

CHAP. VII. "justices shall inquire by inquest if he were murdered or slain  
"by await, assault, or malice prepensed; and if they find that  
"he was murdered or so slain, the charter shall be disallowed."

Upon such finding of the jury the King was presumed to have been deceived in his grant; and therefore the statute provideth, that no general words in the pardon, how comprehensive soever, shall avail the offender. The Crown was not presumed intentionally to pardon premeditated murder, unless it's intention was plainly and clearly expressed in the charter.

The statutes ousting clergy in the case of wilful murder likewise presuppose an established well-known distinction between that offence and simple felonious homicide; and fall in exactly with our present notion of homicide attended with and aggravated by the circumstance of *malice prepensed*.

12 *H. VII. c. 7.* if any *lay-person prepensedly* murder his lord &c.

23 *H. VIII. c. 1.* ousteth clergy in case of wilful murder of malice prepensed; but excepteth persons in holy orders, viz. of the order of subdeacon or above.

25 *H. VIII. c. 3.* referreth to the 23d, and is *with regard to the present question* merely auxiliary to it.

P. 330—336.

1 *Edw. VI. c. 12.* which for reasons given in another place, I think, hath superseded both the acts of *H. VIII.* as far as concerneth the enumeration of offences ousted of clergy, describeth the offence by the term murder of malice prepensed; but doth not extend to accessaries before the fact, nor to persons standing mute &c, as the two acts of *H. VIII.* taken together did.

4 & 5 *Ph. and M. c. 4.* is auxiliary to the act of *Edw. VI.* and extendeth to accessaries before the fact, and to persons standing mute &c, and the offence is here described singly by the words *wilful murder*; which, in the language of the law, *ex vi termini* import every thing we now understand by murder of malice prepensed in contra-distinction to manslaughter.

Bro. Indictment, pl. 7.

And therefore in an indictment for murder the word *murdravit* is so necessary and essential in the description of the offence, that no words, however importing the same offence,

*ex malitiâ præcogitatâ interfecit*, will now bring the case within the statutes; and for want of that technical operative word the defendant cannot be convicted of murder, though he may of manslaughter.

CHAP. VII.

These statutes ousting clergy in the case of murder have introduced a material and lasting distinction between that offence, and what we now commonly call *Manslaughter*, with regard to the consequences of a conviction. But the statutes of *H. VIII.* were extremely partial and defective, all persons in holy orders, who ought themselves to have known and taught others their duty, being excepted; and the statute of *H. VII.* already cited was in like manner defective. This defect the statutes of *Edw. VI.* and of *Ph. and M.* have supplied.

(See 28 *H. VIII.*  
c. 1. f. 7. & 32 *H.*  
*VIII.* c. 3. f. 6,  
7, 8. 2 *Hale*  
375. 4 *Black.*  
c. 28. f. 1.)

But still, all persons not capable of holy orders, as women, who from the delicacy of their frame seem to be the most susceptible of human passions, and some others, were left to the extreme rigour of the common-law, and to the mercy of the Crown; for at common-law all felonies, except petit larciny, rape and mayhem, were considered as capital offences, unless in cases where the offender was capable of holy orders and qualified for them; and in those cases, I am sorry to say it, murders, though of the most atrocious kind, were not excluded: and therefore wherever I speak of the benignity of the law and its condescension to human infirmity in the case of manslaughter, I would be always understood to speak of the law in its present state.

But light and sound sense have at length, though by very slow degrees, made their way to us. We now consider the benefit of clergy, or rather the benefit of the statutes; as a *relaxation of the rigour of the law*; a condescension to the infirmities of the human frame: and therefore in the case of all clergyable felonies we now measure the degree of punishment by the real enormity of the offence; not, as the ignorance and superstition of former times suggested, by a senseless dream of sacred persons or sacred functions.

The 21 *Jac. I.* c. 6. went a little, and but a little, way in favour of the better half of the human race. Women for grand

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CHAP. VII. larciny to the value of 10 s. were put upon the same foot as men intitled to clergy.

3 & 4 W. & M. c. 9. It is really astonishing, that when their case came so professedly under the consideration of the legislature more was not then done in their behalf: but here for more than half a century the wisdom of the nation stopped short; till the 3d and 4th of W. and M. put women in all cases of clergyable felonies upon the same foot as men intitled to clergy.

5 An. c. 6.

(See 4 Black. c. 28. f. 2.)

The 5th of Queen Anne at length abolished the idle ceremony of reading, and so broke down, if I may use the expression, the wall of partition between subject and subject under one and the same degree of guilt. This measure intitled those who before were supposed to be under a legal incapacity for orders, as *Jews* and some others were, and likewise those who in presumption of law were not qualified in point of learning, of which reading a scrap of Latin \*, which they called *the neck-verse*, was commonly made the test,—this measure intitled all these to the indulgence of the law in common with the rest of their fellow-subjects.

From this period the measure of punishment hath, as I before hinted, been governed by the degrees of real guilt; not by an absurd distinction between subject and subject, originally owing to downright impudence on one hand, and to mere fanaticism or amazing pusillanimity on the other.

Thus hath the order of things, which the pride and presumption of the *Romish* clergy introduced, and the ignorance or enthusiasm of the laity adopted, been happily inverted. Our ancestors in questions touching the allowance or non-allowance of clergy regarded solely the function or abilities of the offender, we the real demerit of the offence.

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\* *Miserere mei Deus.*



## C H A P. VIII.

## CHAP. VIII.

## Of Murder.

I HAVE already observed, that our oldest writers made P. 302.  
 use of the term *Murder* in a very narrow limited sense; and that in succeeding ages the definition of this offence, in contra-distinction to simple felonious homicide, was enlarged so as take in all the cases which appeared to have been attended with circumstances indicating a premeditated malice in the party killing; and that this enlarged idea hath long obtained, and exactly falleth in with our present notion of murder of malice prepense.

I have likewise endeavoured to state and illustrate by au- P. 356.  
 thorities already cited the true legal notion of the term *Malice* as applied to the case of murder, which I will not now repeat. It is sufficient to refer the reader to what is offered by way of preliminary to the discourse, upon the subject of homicide in general.

I chose to enlarge upon that point there rather than in this place; because I thought that many things which I have said in treating of the lower species of homicide, whether justifiable, excusable, or alleviable, would be better understood by first fixing in the reader's mind the true idea of that degree of malignity implied in the term *Malice*; which, in cases *primâ facie* falling within the lower species, hath made the fact, all circumstances considered, amount to the crime of murder. I have likewise, as I went along, endeavoured to state the circumstances from which the law inferreth the malignity of the heart.

These matters have, I confess, in a manner exhausted the subject I am now professedly entering upon: but as the law concerning murder is interwoven with the lower species of homicide, and ariseth from a variety of circumstances connected with them, this anticipation became in some measure necessary; since in treating of the cases which *primâ facie* seem to fall under the lower species I could not make myself better understood than by considering them under every light they

CHAP. VIII. will bear. I will therefore confine myself to the circumstances importing prepenfed malice, which have not already fallen in my way; though I fear that the nature of my subject, complicated as it is, will betray me into some little repetition, which I will avoid as much as possible.

The grosser instances of wilful murder, and where the malignity of the heart, the *malitia* I have already explained, is apparent, need not to be mentioned in a discourse of this kind. The cases upon which doubts have arisen, or which may be the subject of future litigation, are only proper to be mentioned; and to such I shall confine myself.

Sect. 1.  
P. 270.  
Rules as to officers of justice and their assistants.

SECT. 1. Something hath been said briefly under the head of homicide in advancement of justice, touching the killing of officers in the execution of their offices, and of other persons having authority to arrest or imprison, or acting under colour of such authority. But this being a matter in which the justice of the kingdom is deeply concerned, I will now submit to consideration my thoughts upon that subject more at large.

(1 Hale 457 &c.) Ministers of justice, while in the execution of their offices, are under the peculiar protection of the law. This special protection is founded in great wisdom and equity, and in every principle of political justice. For without it the publick tranquillity cannot possibly be maintained, or private property secured; nor in the ordinary course of things will offenders of any kind be amenable to justice: and for these reasons the killing of officers so employed hath been deemed murder of malice prepenfe, as being an outrage wilfully committed in defiance of the justice of the kingdom; the strongest indication possible of the *malitia*, the malignity of heart which I have already stated and explained.

Sect. 2. SECT. 2. This rule is not confined to the instant the officer is upon the spot, and at the scene of action, engaged in the business which brought him thither; for he is under the same protection of the law *eundo, morando, & redeundo*: and therefore if he cometh to do his office, and meeting with great opposition retireth, and in the retreat he is killed, this will

will amount to murder. He went in obedience to the law and in the execution of his office, and his retreat was necessary in order to avoid the danger that threatened him: and upon the same principle if he meeteth with opposition by the way, and is killed before he cometh to the place, *such opposition being intended to prevent his doing his duty, which is a fact to be collected from circumstances appearing in evidence*, this likewise will amount to murder. He was strictly in the execution of his office, going to discharge the duty the law required of him.

CHAP. VIII.  
1 Hale 463.

SECT. 3. Nor is the protection the law affordeth him confined to his own person. Every man who cometh in aid of him (I speak here principally of such officers as at common-law or by the appointment of the Crown are properly conservators of the peace),—every man lending his assistance for the keeping of the peace, or attending for that purpose, whether commanded or not, is under the same protection as the officer himself,

Sect. 3.  
(1 Hale 463.)

SECT. 4. The protection the law affordeth in these cases must not be considered as confined to the ordinary ministers of justice or their assistants. It reacheth, under some limitations, which shall be considered, to the cases of private persons interposing for preventing mischief in case of an affray, or using their endeavour for apprehending felons, or those who have given a dangerous wound, and for bringing them to justice: for those people are likewise in the discharge of a duty the law requireth of them. The law is their warrant, and they may, not improperly, be considered as persons engaged in the publick service and for the advancement of justice, though not specially appointed to it: and upon that account they are under the same protection as the ordinary ministers of justice are.

Sect. 4.  
P. 271, 272.  
P. 318 &c.

SECT. 5. This rule is not confined to those who are present so as to have ocular proof of the fact, or to those who first come to the knowledge of it: for if in these cases fresh-suit be made, and *a fortiori* if hue and cry be levied, all who join

Sect. 5.

CHAP. VIII. in aid of those who began the pursuit are under the same protection of the law as the others are, and stand in every respect upon the same foot: otherwise no man of common prudence would join in the pursuit; and many great offenders would escape the hands of justice.

1 Hale 464.

A robbery is committed on the highway or elsewhere, the country upon notice riseth and pursueth the robbers, who turn and make resistance, and in the struggle one of the robbers is killed; this on the part of the pursuers is justifiable homicide. But on the other hand, if one of the pursuers is killed by the robbers or any of them, it will be murder in the whole gang *joining in such resistance*, whether present at the murder or at a distance, *but taking a part in such resistance*. The law is the same in case of hue and cry duly levied.

SECT. 6.

Nor is this special protection of the law confined to cases of a merely criminal nature, where the publick peace is broken or endangered. The ministers of justice in civil suits, under proper limitations which shall be considered, are intitled to the same protection for themselves and followers, and upon the same principles of political justice.

But these rules require some farther explanation.

SECT. 7.

Kel. 66, 115.

1 Hale 460, 461.

With regard to such ministers of justice who in right of their offices are conservators of the peace, and in that right alone interpose in the case of riots or affrays, it is necessary, in order to make the offence of killing them amount to murder, that the parties concerned should have some notice with what intent they interpose; otherwise the persons engaged may in the heat and bustle of an affray imagine, that they came to take a part in it. But in these cases a small matter will amount to a due notification. It is sufficient, if the peace be commanded, or the officer in any other manner declare with that intent he interposeth. Or if the officer be within his proper district, and known or but generally acknowledged to bear the office he assumeth, the law will presume, that the party killing had due notice of his intent, especially if

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it be in the day-time. In the night some farther notification is necessary, and commanding the peace, or using words of the like import notifying his business will be sufficient. CHAP. VIII.

I remember a saying of a very learned judge, *That a constable's staff will not make a constable.* This is very true. But if a minister of justice be present at a riot or affray within his district, and, in order to keep the peace, produce his staff of office, or any other known ensign of authority: this, I conceive, will be a sufficient notification with what intent he interpose; and if, after this notification, resistance is made, and he or any of his assistants killed, it will be murder in every man who joined in such resistance.

And in the case of arrests upon process, whether by writ or warrant, if the officer named in the process give notice of his authority, and resistance be made and the officer killed, it will be murder; if in fact such notification was true *and the process legal*: for after such notification the parties opposing the arrest acted at their own peril.

Private persons interposing in case of sudden affrays for parting the combatants and preventing bloodshed must undoubtedly give express notice of their friendly intent, for the reason given above.

SECT. 8. I have said above by way of caution, *if the process be legal*: but I would not be understood to mean any thing more than, *provided the process, be it by writ or warrant, be not defective in the frame of it, and issue in the ordinary course of justice from a court or magistrate having jurisdiction in the case.*

Sect. 8.

There may have been error or irregularity in the proceeding previous to the issuing of the process; but if the sheriff or other minister of justice be killed in the execution of it; this will be murder: for the officer, to whom it is directed, must, at his peril, pay obedience to it. And therefore if a *capias ad satisfaciendum, fieri facias*, writ of assistance, or any other writ of the like kind issue directed to the sheriff, and he or any of his officers be killed in the execution of it, it is sufficient upon an indictment for this murder to produce the writ and warrant, without shewing the judgment or decree. So ruled by

(9 Co. 68 a.  
1 Hale 457.)

CHAP. VIII. Lord *Hardwicke* in the case of one *Rogers*\* at the summer assizes in *Cornwall* in the year 1735.

(1 Hale 460.) And in the case of a warrant from a justice of the peace, *in a matter wherein he hath jurisdiction*, the person executing such warrant is in like manner under the special protection of the law; though such warrant may have been obtained by gross imposition on the magistrate, and by false information touching matters suggested in it. See the case of *Richard Curtis* before reported.

Soct. 9. SECT. 9. But if the process be defective in the frame of it, as if there be a mistake in the name or addition of the person on whom it is to be executed, or if the name of such person, or of the officer be inserted without authority, and after the issuing of the process, or the officer exceed the limits of his authority, and be killed; this will amount to no more than manslaughter *in the person whose liberty is so invaded*.

How far other persons, especially mere strangers, interposing in behalf of the party whose liberty is invaded, will be intitled to the same indulgence, deserveth great consideration.

Soct. 10.  
Strangers of-  
ficiously inter-  
posing.  
Ld. Raym. 1296.

SECT. 10. The doctrine advanced in the case of the Queen against *Tooly* and others hath, I conceive, carried the law in favour of private persons *officiously* interposing farther than found reason, founded in the principles of true policy, will warrant. I say *officiously* interposing, because the interposition of private persons in the cases I have mentioned, for preserving the peace and preventing bloodshed, standeth upon a quite different foot.

In *Tooly's* case, the imprisonment of the woman was certainly unjustifiable. The constable † was out of his precinct,

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\* This man by the help of a gang of desperate fellows stood out a long time in a chancery-suit, and kept possession of the premises in question against all manner of process. At length the sheriff attended by the *posse comitatus* endeavouring to execute the process, three of the *posse* were killed by him or some of his gang, he present and abetting. For these murders he was tried and convicted. In the course of the trials the writ of execution, the injunction for delivering possession, and the writ of assistance were read in evidence, but not the decree. The judge being apprehensive of a rescue, he was by special order executed the next day.

† I use the term constable merely for the sake of brevity, for the man was no constable in the precinct where the arrest and imprisonment were.

and

and had no special warrant for what he did; nor had the woman at that time misbehaved. His assistant therefore was not under the special protection of the law I have mentioned: but whether this illegal imprisonment was in the eye of the law a sufficient provocation to the defendants, *who were strangers to her and her case*, is yet to be considered; for all voluntary felonious homicide without a provocation is undoubtedly murder.

It was holden by seven of the judges against five, that it was a sufficient provocation. For, said *Holt* in giving judgment, “if one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people out of compassion, much more where it is done *under colour of justice*; and where the liberty of the subject is invaded, it is a provocation to all the subjects of England.—A man ought to be concerned for *magna charta* and the laws; and if any one against law imprison a man, he is an offender against *magna charta*.”

The cases of Sir *Henry Ferrers's* servant and of *Hopkin Hugget* were cited by the chief-justice in his argument, and greatly relied on. But those cases do not, in my opinion, warrant the doctrine in the latitude here laid down.

In the former, a quarrel arising between the servant and the officer after Sir *Henry* had submitted to the arrest and was put into a place of security, they fought and the officer in this affray was killed. It doth not appear upon what provocation the quarrel and affray began, and the report maketh it highly probable, that no rescue was thought of or attempted. The words are, “The servant in seeking to rescue him AS WAS PRE-  
TENDED killed the officer.” Cro. Car. 371.

If the matter of the rescue was a mere pretence, and, for aught appearing by the state of the case, it was no more than a preterice, the case was clearly manslaughter, homicide upon a sudden affray; without entering into the question touching the insufficiency of the writ or warrant. The reporter doth indeed mention this matter as an ingredient in the case; but general rules thrown out in argument, and carried farther than the true state of the case then in judgment requireth, have, I confess, no great weight with me.

I do

CHAP. VIII. I do not say, that incompetent reasons, where better might have been given, derogate from the authority of the judgment; but they certainly derogate from the authority of the rule upon which the judgment is supposed to be founded.

1 Hale 465.

*Hugget's* case likewise, as stated by *Hale*, was clearly manslaughter, a sudden quarrel and affray, and a combat between him and an assistant of the press-master upon some rudeness offered or supposed to be offered on the part of the assistant; upon which, saith *Hale*, a quarrel arose between them, and in the end the assistant was killed \*.

I take the liberty of observing, as I go on, that *Hale*, who at the conference concurred with those who were of opinion, that the case amounted to manslaughter only, doth not say a syllable touching the provocation which an act of oppression towards individuals might be supposed to give to the by-standers; and he certainly representeth the case in the light it appeared to him at that time, as a sudden quarrel upon some rudeness offered by the press-master's assistant.

Kel. 59.

The case, as it is reported by *Kelyng*, doth indeed turn upon the illegality of the impress, and the provocation such an act of oppression may be presumed to give to every man, be he stranger or friend, out of mere compassion to endeavour a rescue: and, say the major part of the judges, if in such endeavour of rescue they kill any one, such killing will be manslaughter.

In this case the judges were divided in opinion, four that it was murder, eight that it was manslaughter †.

Sect. 11.

SECT. 11. Without entering at present into the merits of this case, I think *Tooly's* differed widely from it. In this, swords were drawn, and a mutual combat ensued; the blood was overheated in the affray before a mortal wound was given. In *Tooly's*, the soldiers at the first meeting with the

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\* *Kelyng* saith, that swords were drawn on both sides, and they fought.

Kel. 60, 62.

† These judges said at the conference, *That as then advised they were of that opinion; but they would not be bound by it.* The reporter and the other judges of the King's Bench, after hearing counsel upon the special verdict, adhered to their former opinion, that it was murder: but out of deference to the majority they admitted the defendant to his clergy. (See the case as stated by *Holt. Kel. 137.*

constable



constable drew their swords upon him unarmed against such weapons; but they soon put them up appearing to be pacified, and cool reflection seemed in some measure to have taken place. At the second meeting the deceased received his death's wound before a blow was given, or, for aught appeared, offered on the part of him or any part of his party.

In *Hugget's* case a rescue seemed to be practicable at the time the affray began: and it is observable, that the judges who held it to be manslaughter put the point upon *an endeavour to rescue*. I will not say, that the possibility of a rescue was a sufficient motive to endeavour at it, but still there was a possibility, which might induce the men to attempt it. But in *Tooley's* the case was quite otherwise, unless the soldiers could hope to force the roundhouse; for the woman was there secured before the second encounter, and before the deceased appeared to have taken any part in the affair: so that the second assault on the constable seemeth rather to have been grounded upon resentment or a principle of revenge for what had before passed, than upon any hope or endeavour to assist the woman.

SECT. 12. I have been longer on this case than I should have been, had I not thought the doctrine advanced in it utterly inconsistent with the known rules of law touching a sudden provocation in the case of homicide; and, which is of more importance, inconsistent with the principles upon which all civil government is founded and must subsist.

Sect 12.

The indulgence shewn to the first transport of passion in these cases is plainly a condescension to the frailty of the human frame, to the *furor brevis*, which, while the frenzy lasts, rendereth the man deaf to the voice of reason. The provocation therefore which extenuateth in the case of homicide must be something which the man is conscious of, which he feeleth and repenteth at *the instant the fact which he would extenuate is committed*; not what time or accident may afterwards bring to light. Now what was the case of *Tooley* and his accomplices, stripped of a pomp of words and the colourings of artificial reasoning? They saw a woman, for aught appears,

CHAP. VIII. appears, *a perfect stranger to them*, led to the roundhouse under a charge of a criminal nature. This upon evidence at the *Old Bailey*, a month or two afterwards, cometh out to be an illegal arrest and imprisonment, a violation of *magna charta*; and these ruffians are presumed to have been seized, all on a sudden, with a strong fit of zeal for *magna charta* and the laws, and in this frenzy to have drawn upon the constable and stabbed his assistant.

It is extremely difficult to conceive, that the violation of *magna charta*, a fact of which they were totally ignorant at that time, could be the provocation that led them into this outrage.

But admitting, for argument-sake, that it was, we all know, that words of reproach, how grating and offensive soever, are, in the eye of the law, no provocation in the case of voluntary homicide: and yet every man who hath considered the human frame, or but attended to the workings of his own heart, knoweth, that affronts of that kind pierce deeper and stimulate in the veins more effectually than a slight injury done to a third person, though under colour of justice, possibly can. The indignation that kindleth in the breast in one case is instinct, it is human infirmity; in the other, it may possibly be called a concern for the common rights of the subject; but this concern, when well founded, is rather founded in reason and cool reflection than in human infirmity: and it is to human infirmity alone that the law indulgeth in the case of a sudden provocation.

SECT. 13.

SECT. 13. But if a passion for the common rights of the subject in the case of individuals must, against all experience, be presumed to inflame beyond a personal affront, let us suppose the case of an upright and deserving man, universally beloved and esteemed, standing at the place of execution under a sentence of death *manifestly unjust*. This is a case that may well rouse the indignation, and excite the compassion of the wisest and best of men: but wise and good men know, that it is the duty of private subjects to leave the innocent man to his lot, how hard soever it may be, without attempting a rescue; for otherwise all government would

would be unhinged. And yet, what proportion doth the case of a false imprisonment for a short time, and for which the injured party may have an adequate remedy, bear to that I have now put ?

CHAP. VIII.

SECT. 14. What I have now said suggesteth a thought, which I will mention, and submit to farther consideration.

SECT. 14.

I am firmly persuaded, that in cases such as these a general submission to the known badges of authority exacted from all persons, strangers to the party supposed to be injured or his cause, would greatly conduce to the stability of government ; in the fate of which all private rights are involved. On the other hand, an undue countenance given to a spirit of popular opposition, upon the principles of FALSE PATRIOTISM, hath a fatal tendency to loosen the reins of government, and to throw matters into general confusion.

This is a consideration of great importance ; and if the reader will apply it to the cases of *Hugget* and *Tooly*, and the reasoning on them, he will not find it difficult to determine on which side the justice of the case, that justice I mean which is due to the publick, doth preponderate.

There is undoubtedly a justice due to the community, founded in the interest every individual hath in the publick tranquillity ; which once destroyed, all private rights will sink and be absorbed in the general wreck : and if the common rights of the subject are supposed to be the object in view, (it is an object which deserveth the attention of all wise and good men at proper seasons, and under those limitations which wisdom and a just concern for the publick will suggest,) let it be remembered, that liberty is never more in danger than when it vergeth into licentiousness. *Cæsar* cherished a spirit of licentious popularity against the Senate, *Cromwell* cherished the same spirit against Crown and Senate ; both set up a tyranny of their own subversive of true liberty, which ever must be founded in law, and protected by it.

These considerations have led me into a free, and perhaps too prolix, examination of the opinions of learned men, whose merit

CHAP. VIII. merit I esteem, and to whose memory I shall constantly pay a proper regard.

Sect. 15.  
Cautions to be  
observed.

SECT. 15. In the case of private persons using their endeavours to bring felons to justice, these cautions ought to be observed.

Cro. Jac. 194.  
2 Inst. 52. 172.

That a felony hath been actually committed. For if no felony hath been committed, no suspicion, how well soever grounded, will bring the person so interposing within the protection of the law in the sense I have already stated and explained.

Sect. 16.  
2 Hale 490.

SECT. 16. Supposing a felony to have been actually committed, but not by the person arrested or pursued upon suspicion, this suspicion, though probably well founded, will not bring the person endeavouring to arrest or imprison within the protection of the law, so far as to excuse him from the guilt of manslaughter, if he killeth, or on the other hand to make the killing of him amount to murder. I think it would be felonious homicide, but not murder, in either case; the one not having used due diligence to be apprized of the truth of the fact; the other not having submitted and rendered himself to justice, since, if his case would bear it, he might have resorted to his ordinary remedy for the false imprisonment.

Sect. 17.  
Ibid.

SECT. 17. But if *A.*, being a peace-officer, hath a warrant from a proper magistrate for the apprehending of *B.* by name upon a charge of felony, or if *B.* standeth indicted for felony, or if the hue and cry is levied against *B.* by name; in these cases, if *B.*, though innocent, fleeth, or turneth and resisteth, and in the struggle or pursuit is killed by *A.* or any person joining in the hue and cry, the person so killing will be indemnified: and on the other hand, if *A.* or any person joining in the hue and cry is killed by *B.* or any of his accomplices joining in that outrage, such occision will be murder; for *A.* and those joining with him were, in this instance, in the discharge of a duty the law requireth from them, and subject to punishment in case of a wilful neglect of it.

SECT.

SECT. 18. With regard to the ministers of justice executing the ordinary process of the law, and likewise to private persons endeavouring to arrest or imprison in the cases I have mentioned, it behoveth them to be very careful that they do not misbehave themselves in the discharge of their duty; for if they do, they may forfeit this special protection I have been speaking of\*.

One instance of their misbehaviour, which hath been the subject of litigation, is that of breaking open windows or doors, in order to arrest: and as this is a matter of general concern, I will be a little more particular, though brief, upon it.

SECT. 19. The officer cannot justify the breaking open an outward door or window in order to execute process in a civil suit. If he doth he is a trespasser. But if he findeth the outward door open, and entereth that way, or if the door is opened to him from within, and he entereth, he may break open inward doors, if he findeth *that* necessary, in order to execute his process.

(2 Roll. Rep.  
137. Palm. 52.  
1 Hale 458, 459.  
Cowp. 1.)

The books say, that a man's house is his castle for safety and repose to himself and family; and consequently the officer, in the case I have put, being a trespasser, cannot be said to be acting in the discharge of his duty, at the time and in the very instance in which he is committing a trespass. These suppositions are inconsistent, and destroy each the other. But if he findeth the door open, or gaineth admission from within, he having a lawful call to the place, as he certainly hath, cannot be a trespasser in entering the house, and consequently may remove any obstruction he meeteth with in prosecuting the business he came about.

SECT. 20. The rule, that every man's house is his castle, when applied to the case of arrests upon legal process, hath been carried as far as the true principles of political justice will warrant; perhaps beyond what in the scale of sound reason and good policy they will warrant: but in

\* See Chap. 6. on the statute of Stabbing, the case of a bailiff who pushed violently and abruptly into a gentleman's chamber in order to arrest him.

CHAP. VIII. cases of life we must adhere to rules well known and long established.

But this rule is not one of those which will admit of any extension. It must therefore, as I have before hinted, be confined to the breach of windows and outward doors intended for the security of the house against persons from without endeavouring to break in.

Sect. 21.  
5 Co. 93.  
(2 Hale 117.)

SECT. 21. It must likewise be confined to a breach of the house in order to arrest *the occupier, or any of his family* who have their domicile, their ordinary residence there: for if a stranger, whose ordinary residence is elsewhere, upon a pursuit taketh refuge in the house of another, this is not *his* castle, he cannot claim the benefit of sanctuary in it.

Sect. 22.  
Salk. 79.

6 Mod. 173.  
Ld Raym. 1028,  
(2 Roll R. 138.  
1 Hale 459.)

SECT. 22. The rule is likewise confined to the case of arrests *in the first instance*: for if a man, being legally arrested, (and laying hold of the prisoner and pronouncing the words of arrest is an actual arrest,) escapeth from the officer, and taketh shelter though *in his own house*, the officer may, upon fresh suit, break open doors in order to retake him, having first given due notice of his business and demanded admission, and been refused.

And let it be remembered, that not only in this but in every case where doors may be broken open in order to arrest, whether in cases criminal or civil, there must be such notification, demand, and refusal, before the parties concerned proceed to that extremity.

Sect. 23.

(See the case  
of Curtis in  
the Report,  
p. 135.)

SECT. 23. The rule already mentioned must likewise be confined to the case of arrests upon process in civil suits: for where a felony hath been committed or a dangerous wound given; or even where a minister of justice cometh armed with process founded on a breach of the peace, the party's own house is no sanctuary for him; doors may in any of these cases be forced, the notification, demand, and refusal before-mentioned having been previously made.

In these cases the jealousy with which the law watcheth over the publick tranquillity, (a laudable jealousy it is,)  
the

the principles of political justice, I mean the justice which is due to the community, *ne maleficia remaneant impunita*, all conspire to supersede every pretence of private inconvenience; and oblige us to regard the dwellings of malefactors, when shut against the demands of publick justice, as no better than the dens of thieves and murderers, and to treat them accordingly.

But bare suspicion touching the guilt of the party will not warrant a proceeding to this extremity, though a felony hath been actually committed; unless the officer cometh armed with a warrant from a magistrate grounded on such suspicion.

SECT. 24. Gaolers and their officers are under the same special protection that other ministers of justice are: and therefore if, in the necessary discharge of their duty, they meet with resistance, whether from prisoners in civil or criminal suits, or from others in behalf of such prisoners, they are not obliged to retreat as far as they can with safety, but may freely and without retreating repel force by force; and if the party so resisting happeneth to be killed, this on the part of the gaoler, or his officer, or any person coming in aid of him will be justifiable homicide. On the other hand, if the gaoler, or his officer, or any person coming in aid of him should fall in the conflict, this will amount to wilful murder in all persons joining in such resistance. It is homicide committed in defiance of the justice of the kingdom.

Sect. 24.  
Gaolers and  
their officers.

SECT. 25. But in regard to the great power these officers have, and, while it is exercised with moderation, ought to have over their prisoners, the law watcheth with a jealous eye over *their* conduct: and therefore if a prisoner under their care dieth, whether by disease or accident, the coroner upon notice of such death, which notice the gaoler is obliged to give in due time, ought to resort to the gaol, and there upon view of the body make inquisition into the cause of the death; and if the death was owing to cruel and oppressive usage on the part of the gaoler or any officer of his, or, to speak in the language of the law, to *durets of imprisonment*, it will be deemed wilful

Sect. 25.

(1 Hale 432.  
2 Hale 57.)

CHAP. VIII. murder in the person guilty of such dures. I say *the person guilty of the dures*, because though in a civil suit the principal may in some cases be answerable in damages to the party injured through the default of the deputy upon the principle of *respondeat superior*; yet in a capital prosecution, the sole object of which is the punishment of the delinquent, each man must answer for his own acts or defaults.

Str. 896. The instances of oppression, which may fall within the rule of dures of imprisonment, are as various as a heart cruelly bent upon mischief can invent. I will mention two which have lately come in judgment. A gaoler, knowing that a prisoner infected with the small-pox lodged in a certain room in the prison, confined another prisoner, *against his will*, in the same room. The second prisoner, who had not had the distemper, *of which the gaoler had notice*, caught the distemper, and died of it. This was very rightly holden to be murder in the gaoler.

Ibid. 884.  
(Ld. Raym.  
2578.)

Another straitly confined his prisoner in a low, damp, unwholesome room without allowing him the common necessities of chamber-pot, &c. for keeping things sweet and clean about him. The prisoner, having been long confined in this manner, contracted an ill habit of body, which brought on distempers, of which he died. This likewise was very rightly holden to be murder in the party guilty of this dures.

These were deliberate acts of cruelty, and enormous violations of the trust the law reposes in its ministers of justice.

Having, as I observed in the beginning of this chapter, already considered the cases of murder which fall in and are connected with the lower species of homicide, I have now gone as far into the subject of murder in general as I propose at present: for I forbear to enter in this place into a minute consideration of the case of principals in the first and second degrees in murder, and also of those who may be deemed accessories before or after the fact; intending to consider these matters at large under the head of *Accomplices*. Upon which occasion something will be said in general touching the *participes criminis* in the case of high treason and other capital offences.

CHAP.



## C H A P. IX.

CHAP. IX.

## Of Petit Treason.

**H**AVING said as much as I think necessary to say in this place upon the subject of murder in general, I come now to speak of that aggravated kind of murder which our law hath distinguished by the name of *Petit Treason*.

Former writers, following the order they found in the statute of treasons, have generally chosen to treat of petit, immediately after high treason, before they enter into the consideration of any other species of homicide. I suspect, that this circumstance, small as it may seem, hath contributed to lead unwary people into an opinion, that petit treason is, in consideration of law, an offence of a *different kind* from murder. I have therefore, in treating on the subject of homicide, chosen to begin with the lowest species, and, following the order of law, to rise gradually to murder; and shall conclude with, what I take to be in consideration of law, the highest degree of that offence, murder aggravated by circumstances of a treasonable kind.

I shall not enter into a detail of the several cases provided for by that clause in the statute of treasons which relateth to this offence; nor of those which by construction have been brought within it. This part of the subject hath been sufficiently spoken to by writers who have gone before me, and to them I refer the reader.

I shall content myself with inquiring, and stating with as much precision as I can, in what respects the law considereth this offence as mere murder, and in what respects it may fall under a different consideration.

**SECT. I.** An appeal of death will lye in the case of petit treason, as well as in every other case of murder; and the appeal chargeth, that the defendant *felonice, proditorie & ex malitia præcogitata* murdered: and in the case of a wife killing her husband, the heir shall have the appeal, and she, if convicted, shall be burnt.

Sect. 1.  
An appeal lyeth.

Jones (W.) 425.  
Cro. Car. 531.  
Stanf. 59. D.

## CHAP. IX.

Sect. 2.

*Pain fort et dure.*

1 Hale 382.

(2 Hale 361,

316, 399.)

SECT. 2. If the defendant on arraignment standeth mute, or refuseth to plead, or peremptorily challengeth above 35, he shall suffer the *pain fort & dure*, as in case of other felonies.

Sect. 3.

It is felony.

(1 Inst. 391. a.)

1 Hale 378.

SECT. 3. Petit treason is considered as a species of felony: and therefore at common-law, and before the statute of 13 Rich. II. *ft.* 2. *c.* 1. interposed, a pardon of felony, without the exception of petit treason, pardoned that offence; and at this day a pardon of murder doth the same.

*Hale* seemeth to have been *once* of opinion, that the exception of murder in a statute-pardon, by which all felonies are pardoned, without an exprefs exception of petit treason, will not except petit treason; and that that offence will be pardoned. This he groundeth on an opinion in *Dyer*: but afterwards upon farther consideration he totally rejecteth that notion.

Dyer 235.

2 Hale 340.

The opinion in *Dyer* is grounded on a misconception of the true scope and intent of the act of general pardon of the 5 *Eliz.* \*, by which all treasons and other offences are pardoned by very general words with an exception of some particular species of high treason, and of ALL MANNER of voluntary murders &c. without any exprefs exception of petit treason *eo nomine*: but in this respect there is nothing very singular in this general pardon; for except that of the 50 *Edw.* III., which hath an exception of all treasons whatsoever, there is not one before the 13 *Eliz.* which hath any general exception applicable to the case of petit treason, unless it be comprehended in the exception of voluntary murder, *which is expressly excepted in all of them.*

It would be absurd to imagine, that petit treason, the most aggravated kind of murder in the eye of the law, was intended to be pardoned by these acts, 12 in number, passed at different times in the compass of about 200 years; and it would be equally absurd to suppose, that, if it was not intended to be pardoned, no care was taken to except it:

\* The acts of general pardon are printed at large in *Rafal's statutes*, and in all the editions anterior to that collection.

and yet all these acts have pardoned petit treason, if it be not excepted under the denomination of *wilful murder*. From whence, I think, it may be safely inferred, that in the judgment of those parliaments the offence of petit treason was excepted under the exception of *wilful murder*.

The exception of petit treason, *eo nomine*, was first introduced by the 13 *Eliz.*, probably *ex abundanti cautela* and with a view to this opinion in *Dyer*; and it hath been inserted, together with the exception of wilful murder, in all the acts of general pardon from that time to the present: but it cannot be inferred from these later acts, that such an express exception was absolutely necessary, without supposing either that our ancestors for about 200 years together intended to pardon petit treason *while they constantly excepted wilful murder*, or that they did not know how to except it in a proper manner.

There is a case in *Dyer* which hath been thought to favour the opinion, that the crime of murder is merged in petit treason, and that a pardon of treason discharged it, notwithstanding the exception of murder: but that case proveth nothing like it. A wife about the 31 *H. VIII.* poisoned her husband; then came a general pardon, by which treason was pardoned, but with an exception of wilful murder. The heir brought an appeal of murder, and it was adjudged, that the appeal did not lie. This case doth not prove, that murder is merged in petit treason, but that both murder and petit treason were merged and extinguished in the offence of high treason; for at that time, by virtue of the 22 *H. VIII.*, *all wilful poisoning was high treason*; and being so, the appeal \*, not being saved by the act, was barred, whether the treason had been pardoned or not.

*Dy. 50.*  
33 *H. VIII.*

22 *H. VIII. c. 9.*  
in *Rastal.*

SECT. 4. A person guilty of petit treason may be indicted of murder, *for it is a species of murder*; and such facts and circumstances, proved in the manner the statutes hereafter cited require, as would convict a man of murder will convict a wife or servant of petit treason: and on the other hand, upon an

Sect. 4.  
It is murder.

\* Vid. 8 *Edw. IV.* an attempt to make sacrilege high treason, and the offender to be burnt. The appeal for restitution is expressly saved. *Cut. 684.*

## CHAP. IX.

1 Hale 378.

2 Hale 184.  
(292.)

indictment for petit treason the jury may find, as the circumstances tending to justify, excuse, or alleviate come out in evidence, in the same manner as they do upon an indictment for murder.

3. 104.

While the case of the King against *Swan* reported before was depending, and before the second bill was preferred, a question was made whether *Swan* could be convicted on the indictment for murder, if it should come out in evidence, that he was servant to the deceased at the time the fact was contrived or committed; and consequently that his offence was petit treason.

6 St. Tr. 224.

There is a case cited in the printed trial of *Coke* and *Woodburne*, which, *if such case there ever was*, hath, as far as the authority of it goeth, determined that question. "At the Summer assizes at *Dorchester* 1712, a woman was indicted before Mr. Justice *Eyre* \* for the murder of another woman; upon evidence it appeared, that the person murdered was her mistress, which made the crime petit treason. The judge directed this matter to be specially found; and upon conference with all the judges it was holden she ought to be acquitted upon this indictment, as she accordingly was, and was afterwards indicted for petit treason, and convicted and executed." This case is not to be found in any report printed or MS. that I have met with, or heard of; nor have I, upon a strict inquiry, met with any footsteps of such case among the minutes of proceedings on the Crown-side in the county where the case is supposed to have arisen; though the minutes from 1708 to 1722 have been carefully searched. For these reasons and what is suggested in the marginal note I conclude, that no such case ever existed.

1 Hale 378.

Lord Chief-Justice *Hale* is very full and expresses on the other side of the question; That a person who is guilty of petit treason may be indicted of murder, *for it is a species of murder*, and a pardon of murder pardoneth petit treason.

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\* Justice *Eyre* did not go the Western circuit in the Summer 1712. *Ward* and *Price* went at that time. This information I have from Mr. *Madlock* Clerk of Assize of the Western Circuit.

Lord Chief-Justice *Coke*, having cited the opinion in *Dyer* 235 before mentioned, saith, "*That petit treason is murder and more.*" and from thence it hath been inferred, that petit treason and murder are, in consideration of law, different offences, or that the crime of murder is merged in petit treason; but this inference will not hold, however true the chief justice's doctrine may be. There is undoubtedly, in consideration of law, a greater degree of malignity in the one than in the other, arising from that degree of allegiance, however low, which the murderer owed to the deceased at the time the fact was committed or conceived in his heart: but certainly the difference in point of malignity between murder and manslaughter is infinitely greater; and consequently in that respect it may with equal propriety be said, that *murder is manslaughter and more*, and yet in judgment of law they are the same offence, differing only in the degree of malignity when considered in relation to one and the same fact: and by a parity of reason Lord Chief-Justice *Hale* concludeth, that petit treason and murder are to be considered in the same light, as one offence, differing only in degree.

4 Co. 46.  
Kel. 103, 104.  
(1 Hale 449.)

2 Hale 246, 252.

But though I am satisfied, that the law considereth petit treason and murder as one offence, differing only in circumstance and degree, yet whether it may be advisable to proceed upon an indictment for murder against a person plainly appearing to be guilty of petit treason is a matter that deserveth great consideration; and probably determined the attorney-general to prefer a fresh bill for petit treason in *Swan's* case: for though the offences are, to most purposes, considered as substantially the same, yet as there is some difference between them with regard to the judgment that is to be pronounced upon a conviction, and a very material one with regard to the trial, a person indicted for petit treason *being intitled to a peremptory challenge of 35*, I think if the prosecutor be apprized of the true state of the case, as he may be if he useth due diligence, he ought to adapt the indictment to the truth of the fact.

But if, through a mistake on the part of the prosecutor, or through the ignorance or inattention of the officer, a bill be preferred as for murder, and it should come out in

## CHAP. IX.

evidence, that the prisoner stood in that sort of relation to the deceased which rendereth the offence petit treason, I do not think it by any means advisable to direct the jury to give a verdict of acquittal: for a person charged with a crime of so heinous a nature ought not to have the chance given him by the court of availing himself of a plea of *autrefois acquit*. In such a case I should make no sort of difficulty of discharging the jury of that indictment, and ordering a fresh indictment for petit treason. In this method the prisoner will have advantage of his peremptory challenges, and the publick justice will not suffer. And on the other hand, in case of an indictment for petit treason, if it be proved, that the defendant killed the deceased with such circumstances of malice as amount to murder, but the relation of servant &c. is not proved, I have no sort of doubt, that on such an indictment the defendant may be found guilty of murder and acquitted of the treason: for murder is included in every charge of petit treason, *felonice, proditorie & ex malitia præcogitata* MURDRAVIT.

1 Hale 378.  
2 Hale 184  
(292.)

The treason is a circumstance of aggravation, of which the defendant may be acquitted, and yet found guilty of the substantial part of the charge; just as a man upon an indictment for murder may be acquitted of that and found guilty of manslaughter: "Because," say the books, "manslaughter is included in the charge of murder."

(See Rad-  
bourne's case in  
Leach 363.)

1 & 2 P. & M.  
c. 13.  
2 & 3 P. & M.  
c. 10.  
Vid. Kel. 55.  
1 Hale 305.  
2 Hale 284.

Vid. Sect. 10.

I will go one step farther, I offer it as my private opinion, which is submitted to the judgment of the learned. Put the case, that a person is brought to his trial upon an indictment for petit treason, and that one witness only can be produced, or that the prosecutor is not furnished with any evidence except the depositions taken before the coroner, or informations taken on oath before justices of the peace pursuant to the statutes; and let it be supposed, that those witnesses are living but unable to travel, or kept out of the way by the procurement of the defendant. What is to be done in this case? Is the defendant to be acquitted of the whole charge? I think not. I think this evidence, though not sufficient to convict of petit treason, is still admissible evidence, and proper to be left to the jury as upon a charge of murder; and the jury, if they are satisfied, may find the

the defendant guilty of the murder, and acquit him of the treason, for the reasons just now given.

CHAP. IX.

2 Hale 184.

*Interest reipublicæ ne maleficia remaneant impunita.*

SECT. 5. A wife or servant joining with a stranger in the same murder may be charged in one indictment, which could not be if their offences were not substantially the same; and such indictment concluding, that they *felonice, proditorie & ex malitiâ præcogitatâ murderaverunt*, is good for both, *reddendo singula singulis*.

SECT. 5.  
Petit treason  
and murder in  
one indictment.

Dalison 16, and  
Swan's case,  
p. 104.

SECT. 6. *Auterfoits* acquit or attain upon an indictment for murder is a good bar to an indictment for petit treason for the same fact, and so *è converso*.

SECT. 6.  
*Auterfoits* ac-  
quit or attain.  
2 Hale 246, 252.  
3 Inst. 213.

SECT. 7. The 1 *Edw. VI.*, which ousteth clergy in the case of wilful murder, extendeth to petit treason and ousteth that likewise; though petit treason is not *eo nomine* ousted, and notwithstanding the statute restoreth clergy to all offences not therein enumerated which were intitled to it before the 1 *H. VIII.*; for *petit treason is a species of murder*.

SECT. 7.  
It is ousted of  
clergy by the  
name *murder*.

Lord Hale is clearly of this opinion, and putteth a case which is not provided for by either of the acts of *H. VIII.*, and yet in his judgment cometh within the 1 *Edw. VI.* It is the case of an outlawry: and he saith, "In my opinion the statute of 1 *Edw. VI.* taking away clergy from persons *attaint* as well as from persons *convict* of murder doth extend to petit treason, *which is in truth murder*; and consequently a person outlawed of petit treason, though not by the statutes of the 23d or 25th *H. VIII.*, yet by the statute of *Edw. VI.* is exempt from clergy under the name of wilful murder."

2 Hale 342.

The only use I make of this passage, (for his Lordship hath not here considered all the statutes touching petit treason with his usual accuracy,) is to shew, that his Lordship considered petit treason merely as a species of murder: and whoever will read the statute of the 12 *H. VII.* cited underneath with any

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attention

CHAP. IX. attention will see, that the legislature considered it in no other light than as an *aggravated murder*.

There is another case, which, I think, is not provided for by any of the acts anterior to that of *Edw. VI.*, and must be wholly resolved into that act. It is the case of petit treason committed by a person in holy orders. The statute of *H. VII.* is confined to lay-persons. The words are, "If any lay-person murder &c." The 23 *H. VIII.* expressly excepteth persons in holy orders, viz. of the order of subdeacon or above; and the 25 *H. VIII.* is evidently confined to persons indicted and arraigned according to the statute of the 23d: and therefore unless petit treason committed by a person in holy orders be ousted by the 1 *Edw. VI.* under the name of wilful murder, it remaineth, for aught I see, still intitled to clergy.

(It was ousted by 28 *H. VIII.* c. 1. and 32 *H. VIII.* c. 3.)

Sect. 8.  
Is the statute 25 *H. VIII.* c. 3. revived in toto?

SECT. 8. I know an opinion hath been entertained by some learned men, that principals in petit treason may be ousted of clergy without supposing petit treason to be comprehended in the 1 *Edw. VI.* under the denomination of wilful murder; for they think, that the whole act of the 25 *H. VIII.* before cited is revived by the 5 and 6 *Edw. VI.* according to the opinion of Lord *Coke* in *Powtler's case*: but that opinion is not well founded. *Hale* was once of the same opinion touching the revival of the 25 *H. VIII.* in toto, and grounded himself on the authority of *Powtler's case*\*; who was denied his clergy upon a conviction for the wilful and malicious burning of a house at *Newmarket*, whereby the greatest part of the town was consumed.

P. 346.

But in his second volume he resumeth the consideration of that case, and, totally rejecting *Coke's* opinion touching the revival of 25 *H. VIII.* in toto, concludeth, that no part of that act was revived except the clause concerning felons convicted of larciny in one county where the goods came into their possession by robbery or burglary in another; and resteth the authority of *Powtler's case* upon a much safer bottom.

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\* See his Summary p. 232 to 235, and History 1 vol. 570 to 574.



I will, for the reader's satisfaction, state the several acts mentioned in *Powtler's* case as shortly as I can, but so as to avoid obscurity. CHAP. IX.

The 23 *H. VIII.* ousted clergy in certain cases therein enumerated, among which the offence *Powtler* stood charged with is one. This act extended to principals and accessaries before the fact, being convicted by *verdict* or *confession*; but did not reach the case of persons wilfully standing mute or challenging peremptorily above twenty, or refusing to plead directly to the indictment. 23 H. VIII.  
c. 1. § 3.

To remedy this defect the 25 *H. VIII.* ousteth such offenders standing mute of malice, or challenging peremptorily above twenty, or refusing to answer the indictment, in like manner as if they had pleaded *not guilty*, and had been found guilty according to the laws of the land. 25 H. VIII.  
c. 3. § 2.

Thus far this statute was merely auxiliary to the former; it barely provided for cases falling within the same rule of distributive justice, but omitted in the former act, probably through mere oversight.

It then proceedeth in the 3d section to a case of a quite different nature and entirely new; and enacteth, that persons coming to the possession of goods by robbery or burglary in one county, and taken with the *manner* in another and there indicted of larciny, shall be ousted in the same manner as if they had been indicted of robbery or burglary in the proper county; if it shall appear upon examination, that the goods were originally taken by robbery or burglary. Ibid. § 3.

The 1st of *Edw. VI.* ousted clergy in certain cases therein enumerated, and, for the most part, provided for by the 23 *H. VIII.*, but is totally silent as to the offence of wilful burning of houses; and, even with regard to the enumerated offences, doth not extend to accessaries before the fact; and farther enacteth, "That, in all other cases of felony, all persons shall have the benefit of clergy as they might have had before the 24th day of *April* in the 1st year of King *Hen. VIII.*," which was the day he began his reign. 1 E. VI. c. 12.  
§. 10.

Wilful burning of houses therefore, which had been ousted by the 23d and 25th of *Hen. VIII.*, was restored to clergy by this clause; and so were accessaries before the fact in all  
the

## CHAP. IX.

the offences therein enumerated; and persons coming to the possession of goods by robbery or burglary in one county and convicted of larciny of the same goods in another were likewise restored to clergy: and from this clause and the act next cited the doubt in *Powlter's* case arose.

5 & 6 E. VI.  
c. 10.

The 5th and 6th of *Edw. VI.*, reciting that the 23d of *H. VIII.* did not extend to persons committing robbery or burglary in one county and taken with the manner in another and there indicted of larciny; and reciting also the clause in the 25th of *Hen. VIII.* already cited, which had ousted those offenders; and farther reciting the restoring clause in the 1st of *Edw. VI.* already cited, by reason whereof, saith the act, *many persons, committing robbery or burglary in one county and fleeing into another and there taken with the manner and convicted of larciny, had been admitted to their clergy, to the great emboldening and comforting of SUCH OFFENDERS*; therefore, *for redress thereof*, it is enacted, "That the statute of the 25th of *H. VIII.* touching the putting of SUCH OFFENDERS from their clergy, and every article, clause, or sentence contained in the same touching clergy, shall, TOUCHING SUCH OFFENCES, stand, remain, and be in full strength and virtue, as it did before the making of the said statute made in the 1st year of the King."

The point laboured by *Coke* in *Powlter's* case is, that this statute revived the *whole* act of the 25th of *Hen. VIII.*; and consequently, that wilful burning, being named in the first clause among the offences enumerated in the act of the 23d, is ousted by the general words *every article, clause, or sentence contained in the same, concerning clergy*.

(*Stanf. 128, a.*) Others, and among them Lord *Hale*, have been of opinion, that, general as the words may seem to be, they must, in the construction of the statute, be restrained to that particular mischief, which, from the preamble, appeareth to have been singly in the contemplation of the legislature, and *for redress whereof* the act was *professedly* made.

They have likewise concluded from the strict penning of the enacting clause itself, that it extendeth only to *such offenders*, and *such offences* as are made the special objects of it, and for that

that purpose are named in the preamble, that is, to persons committing robbery or burglary in one county and fleeing into another and there convicted of larciny.

The statute of the 1st *Edw. VI.* did not, as I before observed, extend to accessaries before the fact, who frequently, in a just estimate of things, are more criminal than the principals. To supply this great defect the 4th and 5th of *Ph.* and *Mary* ousteth these accessaries in murder and the other offences enumerated in the 1st of *Edw. VI.* and some others, and in the enumeration of particulars nameth the offence of *wilful burning of houses*.

4 & 5 Ph. &  
M. c. 4.

The operation of this act, and what influence it had on *Powtler's case*, will be presently considered.

Lord *Hale*, in the passage I last cited from him, saith, that the 23d *H. VIII.* never was revived with regard to the offence of wilful burning. This observation suggesteth the great absurdity of supposing the 25th *H. VIII.* to have been revived *in toto* without reviving the 23d : for both the acts, as far as concerneth this point, are to be considered as forming one entire system of police with regard to the offences which are made the objects of them ; the former extendeth to the cases which ordinarily occur, *convictions by verdict or confession* ; the latter to such as very seldom happen, and are omitted in the former through mere oversight, the *cases of standing mute &c.* This being the state of the case, it is extremely difficult to conceive, that the legislature should seriously intend to revive the one *in toto* without reviving the other ; that they should think of reviving a whole act, part of which is merely auxiliary to a former, without reviving that for the effectuating of which the other was made.

*Hale* having rejected the notion of the revival of the 25th *H. VIII. in toto* addeth, " Therefore the last, and, I think, the surest answer to the difficulty is, that the statute of the 3d and 4th *Ph.* and *M.* taking away clergy in all cases from him that maliciously commands, hires, or counsels the wilful burning, doth, by necessary consequence, take away clergy in all cases from the principal offender."

(4th and 5th.)

This

## CHAP. IX.

This is the bottom upon which he, upon full consideration of the point, thinketh it may be safely rested: and, in truth, upon this bottom, and former precedents, which were carefully consulted, I think it was rested in *Powtler's* case; for though Lord *Coke* in his report of that case strongly laboureth the point of the revival of the 25th *H. VIII. in toto*, and saith *the court so resolved*, yet it is very plain from his own report of the case, that others of the judges, *how many or who he doth not say*, did not concur with him in that opinion. But when he mentioneth the statute of *Pb. and M.*, as one ground of the resolution, he saith, "This was taken by divers of the justices," *by whom or how many he doth not say*, "to be a good interpretation by the whole Parliament of all the said acts concerning this matter. For if the principal should have his clergy, it would be absurd, and what was never seen in our law, that clergy should be taken from the accessory before: and secondly, it would be in vain to take away clergy from the accessory, and leave the principal to have his clergy; for if the principal hath his clergy before judgment, the accessory shall not be arraigned."

11 Co. 35, a.

This reasoning he saith had it's weight with divers of the judges: most probably it was, together with the constant practice in like cases, the principal ground of the resolution in that case. For if the case of a person pleading to the indictment was not within the 25th *H. VIII.* but stood purely on the 23d, as undoubtedly it did, then the bare revival of the statute of the 25th, supposing it to have been revived *in toto*, could not have affected the case of *Powtler*; for *he pleaded not guilty, and was convicted by verdict*.

11 Co. 29, a.

11 Co. 36, b.

Lord *Coke* admitteth, that the 23d *H. VIII.* is not revived by the 5th and 6th *E. VI*; *Hale*, as I before observed, saith the same: but *Coke*, still presuming that the 25th is revived *in toto*, supposeth, that the case of a conviction by verdict or confession is within *the letter* of that act. The words, *as he citeth them*, are, "He" [the person standing mute &c.] "shall lose the benefit of clergy, in like manner as if he had directly pleaded &c, and thereupon had been found guilty, according to the laws of the land." From this clause *so cited*  
he

he concludeth, that every person convicted by verdict or *confession* of any of the crimes mentioned in the act is ousted of clergy without recurring to the act of the 23d.

A little more caution in this citation would have overturned one branch of his Lordship's conclusion, I mean with regard to a conviction upon a *confession*. For the *Ec.* here thrown in covereth some very material words, which the learned reporter in justice to the argument should not have sunk. The words of the act are, "Shall lose the benefit of clergy in like manner as if he had directly pleaded NOT GUILTY, and thereupon had been found guilty, according to the laws of the land." Is here a single word that reacheth the case of a confession? Or can the clause by construction be made to reach it? Quite the contrary. The learned judge himself, in the page next before, admitteth, that, had the 23d *H. VIII.* been so worded, *the case of a confession could not have been brought within that act.* By what rule of construction therefore is it brought within this?

And with regard to the true scope and intention of the statute, surely it was not the intent of it *actum agere*; it was not to provide for the cases of conviction by verdict or confession, which the 23d *H. VIII.*, then in full force, had effectually provided for. The plain intent was to provide for cases *not before provided for*, the cases of standing mute &c, and none other; as any one may see, who will consider the nature of the act, and read it with due attention.

I was willing to enter somewhat largely into the point of the revival of the 25th *H. VIII.*, though perhaps it hath led me a little too far from the subject I have been pursuing; because a great deal of the confusion and obscurity which hath been thrown over the law touching clergy, as it stood upon the acts of *H. VIII.* and *Edw. VI.*, hath arisen from considering the act of the 25th, and sometimes even the 23d *H. VIII.*, as revived; and from blending them with the statutes of *Edw. VI.*, as parts of one system of law touching the allowance or non-allowance of clergy.

In my opinion both the acts were superseded, as far as concerned the allowance or non-allowance of clergy, by the restoring

CHAP. IX. restoring clause in the 1st of *Edw. VI.* already cited; till the 5th and 6th *Edw. VI.* in part, and for the purpose before mentioned, revived that of the 25th, and the statute of *Phil. and Mary* put the matter out of doubt with regard to *Arson*.

The judgment in *Powtler's* case was founded in sound sense, and upon legal principles, though not upon those which the learned reporter hath chosen to found it upon.

Sect. 9.  
Murder and  
petit treason  
substantially the  
same.

SECT. 9. From the rules here laid down, with what hath been offered by way of illustration of them, it appeareth, that the law considereth the offences of murder and petit treason as substantially the same offence, differing only in degree. The latter aggravated by the allegiance, however low, which the murderer owed to the deceased; and in consequence of that circumstance of aggravation, and of that alone, the judgment upon a conviction is more grievous in one case, than in the other; though in common practice no material difference is made in the manner of the execution, unless in some very special cases.

Lib. Aff. 7.  
Bro. Treason,  
15.

I remember a woman \*, for the murder of her husband under circumstances of high and uncommon aggravation, literally *burnt alive*: and we are told, that in a case of petit treason the prisoner was, *by order of the court*, drawn immediately after sentence from *Westminster-hall* to *Tyburn* without the poor comfort of an hurdle, or any other thing to keep his head and body from the ground. This severity the judgment, *to be drawn*, formerly imported; though now *drawn upon an hurdle* is become part of the judgment in all cases of treason.

Sect. 10.  
In some in-  
stances the law  
makes a dif-  
ference.

SECT. 10. There are, it must be admitted, some instances in which the law maketh a wide difference between petit treason and murder, with regard to the trial and method of conviction: but that difference is not founded in the different nature of the offences, but upon merely positive institutions.

The statute of the 22 *H. VIII. c. 14.* reduced the peremptory challenge in the case of petit treason to 20. The

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\* *Catherine Hayes*, convicted at the *Old Bailey* April 1726.

28 *Edw.* III. c. 13., which extended to petit treason, introduced the trial *per medietatem linguæ*. Both these statutes \* were virtually repealed by the 1 & 2 *P. & M.* c. 10., which provideth, that *in all cases of treason* the trial shall be according to the course and order of the common-law. This restored the peremptory challenge of 35.

The 1 *Edw.* VI. c. 12. expressly requireth two witnesses upon the indictment and at the trial, as well in the case of petit as high treason; and the 5 & 6 *Edw.* VI. c. 11, by general words extending to all treasons, requireth, that the witnesses, *if living*, shall be examined in person upon the trial in open court. These statutes are still in force. And although some improvements have been made by the statute of King *William*, yet as that statute extendeth only to the several species of high treason therein provided for, the case of petit treason standeth solely on those of *Edw.* VI.

Upon the foot of the 5 & 6 *Edw.* VI. depositions of witnesses taken by the coroner, or informations taken before justices of the peace, and certified to the gaol-delivery pursuant to the statute, are not evidence *whereon to ground a conviction* for petit treason, *if the party be living*, though unable to travel or kept out of the way by the prisoner or by his procurement.

1 & 2 *P. & M.*  
c. 13.  
1 *Hale* 305.  
2 *Hale* 284.

These, I conceive, are the only instances wherein the law maketh a difference between the cases of petit treason and murder; and this difference is plainly matter of positive institution, and doth not arise out of the different nature of the offences.

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\* (It may deserve to be considered, whether the argument in p. 237, 238, which proves, that the provisions made by the statutes of 1 *Edw.* VI. c. 12. and 5 & 6 *Edw.* VI. c. 11. in favour of the subject are not repealed by the statute of 1 & 2 *P. & M.* c. 10, will not likewise prove, that the trial *per medietatem linguæ*, introduced by the statute of 28 *Edw.* III. c. 13, is not repealed by the statute of *P. & M.*: for the trial *per medietatem linguæ* was certainly intended in favour of the prisoner. But see *Dyer* 144. 3 *Inst.* 27. 1 *Hale* 316. 2 *Hale* 271.)

END OF THE DISCOURSE  
ON HOMICIDE.

Y





**D I S C O U R S E III.**

**O F**

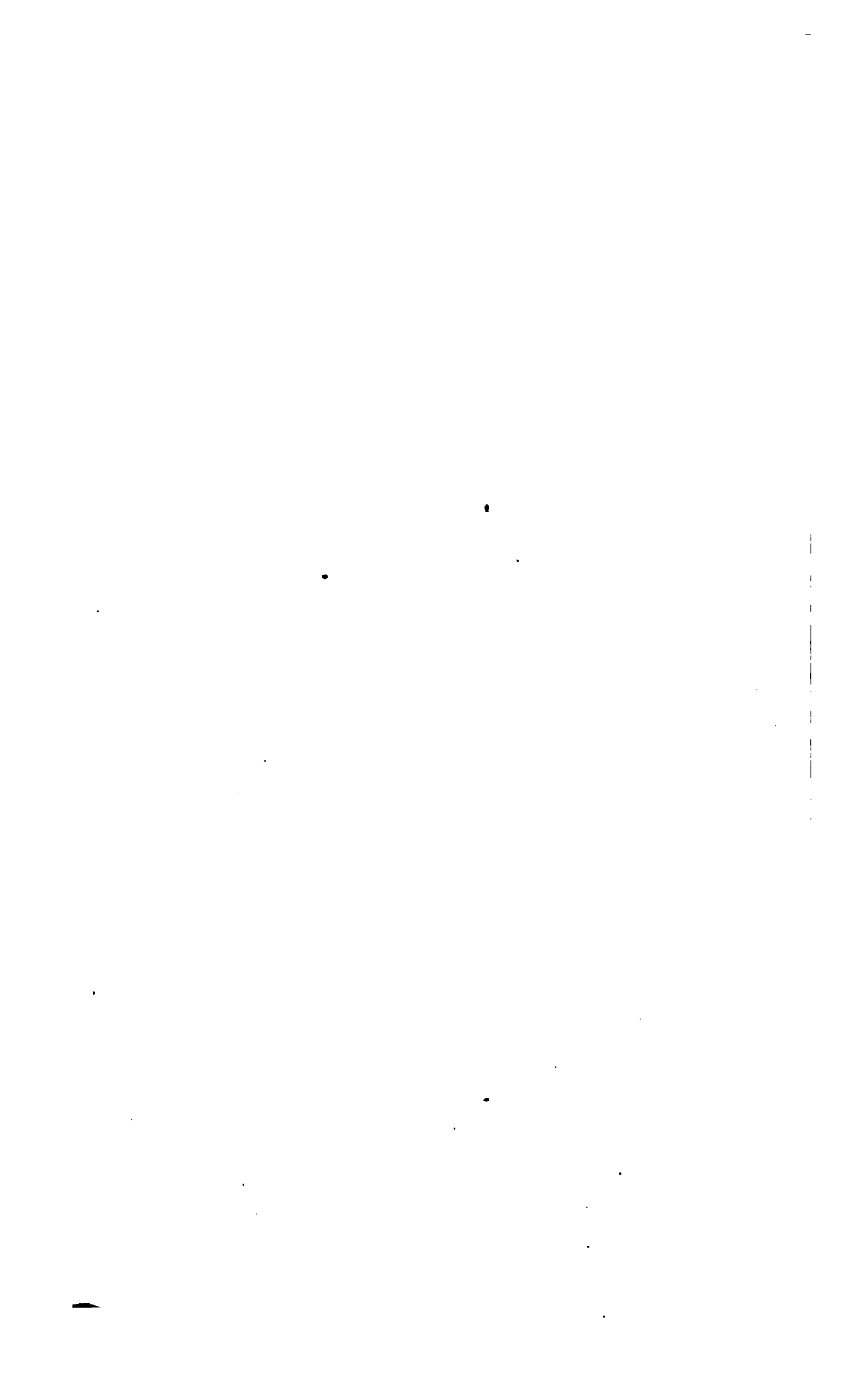
**A C C O M P L I C E S**

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# DISCOURSE III.

## Of ACCOMPLICES in HIGH TREASON and other CAPITAL OFFENCES.

### CHAP. I.

CHAP. I.

Of Accomplices in Treason, and of Persons  
present aiding and abetting in Felony.

**U**NDER this head something will be said briefly touching the connection which in judgment of law subsisteth between principals and accessaries in felony, and the relation they stand in to each other.

But I have in the title of this discourse chosen to make use of the term *accomplices*; because it taketh in all the *participes criminis*, as well in high treason as felony; and in the latter, whether they are considered in strict, legal propriety as principals in the first or second degree, or merely as accessaries before or after the fact.

SECT. I. It is well known, that in the language of the law there are no accessaries in high treason, all are principals. Every instance of incitement, aid or protection, which in the case of felony will render a man an accessary before or after the fact, in the case of high treason, whether it be treason at common-law or by statute, will make him a principal in treason; unless the case be otherwise provided for by the statute creating the offence, or where the special penning of the act leadeth to a different construction.

Sect. I.  
All principals  
in high treason.

See to this purpose 1 Hale 235  
—237. 328. 376.

This rule hath long obtained, and will not now be controverted; but I think it a matter of great importance, that the rule be rightly understood, I mean with those limitations which sound sense and common equity require. For cases have frequently happened, where an offender in the final issue of the prosecution may be considered as a principal in treason; and yet, during the intermediate steps towards his conviction,

## CHAP. I.

he ought, from a principle of natural justice, to be considered merely *as in the nature* of an accessary before or after the fact.

For instance, *A.* adviseth *B.* to counterfeit the King's coin or seals, or indeed to commit any of the offences declared treason by the 25 *Edw.* III, and furnisheth him with means for that purpose: (that species of treason which in judgment of law falleth within the clause of compassing the death of the King, Queen, or Prince always excepted :) if *B.*, in consequence of this advice and encouragement, doth the fact, *A.* is a principal in the treason; for such advice and assistance in the case of felony would have made him an accessary before the fact; and in high treason there are no accessaries, all are principals. But if *B.* forbearth to commit the fact, to which he is incited, *A.* cannot be a traitor merely on account of this advice and encouragement, though his behaviour hath been highly criminal; for bare advice or incitement, how wicked soever, unless in the cases already excepted, will not bring a man within the statute, where no treason hath been committed in consequence of it.

So in the case of assistance or protection supposed to be given to a traitor after the fact, the party knowingly affording such protection, *if the treason hath been in fact committed*, will be a principal in treason for the reasons already mentioned. But if a person lying probably under a suspicion of guilt, conscious of his own innocence, should think it advisable to withdraw and patiently to wait the issue of things when the storm, which gathereth round him, shall be blown over; the party who received and harboured him, during his retreat, cannot be a traitor for so doing; provided the conduct of his friend shall appear, upon examination, to have been blameless.

3 Inst. 9, 128.

Lord Chief-Justice *Coke*, who, while he was in the service of the Crown, seemeth to have had no bowels in state-prosecutions, when he layeth down and applieth the rule I have mentioned, *that all are principals in treason*, plainly goeth upon a supposition, that the treason, presumed to have been procured, *was afterwards in fact committed*; or that the party supposed to have been knowingly received and harboured had been  
actually

actually guilty of high treason. It would have been absurd to the last degree to have gone upon any other supposition; for it cannot be said with any sort of propriety, that a person procured an offence to be committed which in truth never was committed; or that any person knowingly, viz. *with a full knowledge of a treason to have been committed*, (that I take to be the legal sense of the term *knowingly*,) received and harboured the traitor, if such treason never had been committed by him.

There needeth very little to evince the truth of this observation more than to give a proper attention to the rule already mentioned, *That every act which in the case of felony will render a man an accessory will in the case of treason make him a principal*; especially if we add to it, according to Lord Hale, *that nothing short of such an act will*. What circumstance therefore is necessary to render a man an accessory in felony? Plainly this above all others, *that the felony charged upon the principal hath been in fact committed by him*. For which reason no verdict can pass against the accessory till the truth of this single fact shall have been legally established; either by the conviction of the principal if he continueth amenable to justice; or by judgment of outlawry if he abscondeth or fleeth; unless the accessory chooseth to waive the benefit of the law, and to submit to a trial. 1 Hale 239.  
(1 Hale 623.  
2 Hale 224.)

This rule is founded in good sense and natural justice. The accessory is indeed a felon, but guilty of a felony of a different kind from that of the principal. It is, if I may use the expression, a derivative felony connected with and arising out of that of the principal and cannot exist without it.

Whether the same equitable rule is, by parity of reason, to be extended to treasonable actions of a similar nature; I mean to such as are of the derivative kind, and though in the language of the law styled principal treasons, yet partaking of the nature of merely *accessorial* offences, cometh now to be considered. This is the point of importance I hinted at in the outset of this discourse. For if in prosecutions for treasons of this kind the same rule of equity be observed as in cases of felony, it will become a matter of very small importance to have been learning

## CHAP. I.

by what special, technical expression we are to describe the offence.

1 Vol. c. 22.  
p. 233—239.

Lord Chief-Justice *Hale* spendeth a whole chapter on this point, which he intitleth, "Concerning principals and *accessaries* in high treason." And though, in conformity to the established mode of speaking, he calleth every person who can any way be considered as an accomplice in treason *a principal in it*; yet, when he cometh to speak of the course and order to be observed in the prosecution of the offenders, he considereth those accomplices whose supposed guilt is connected with and dependeth upon the real guilt of another in the light of mere accessaries; and stateth a few cases by way of illustration and proof.

A person is committed to prison for high treason, the gaoler voluntarily suffereth him to escape; or a stranger *knowing* of such commitment breaketh the prison and setteth him at large, or knowingly rescueth him after an arrest and before he is brought to prison. In all these cases the gaoler and the person breaking prison or rescuing, whom he in a passage I shall presently cite calleth *a kind of accessaries*, are principals in treason, if the party imprisoned were really a traitor. If he were not so, it will be no treason in them; and therefore they shall not be arraigned till the principal offender be convicted; for if he be acquitted of the principal offence the others shall be discharged.

Cro. Car. 583.  
Jones (W.) 455.

I have used the words *knowing* and *knowingly*, because I think that circumstance is a necessary ingredient in the case. It is true, it was resolved in *Benstead's* case cited here by the learned author and at p. 141, *but, I think, not with entire approbation of the rule*, that the party breaking prison would have been guilty of treason *though he had not known that traitors were there*. I am by no means satisfied with this opinion: for the single authority upon which this point is said by *Hale* to have been so ruled doth by no means warrant it; the book expressly stateth it, *that the party did know that traitors were there*; and *Brooke*, who abridgeth the case, is express to the same purpose, "*Sciant que traitors fueront en ceo*;" and *Coke*, citing the same case, layeth a great stress on this circumstance, *that the party knew that traitors were there*, and conducted them out of prison.

1 H. VI. 5 b.

Bro. Treason II.  
2 Inst. 590.

I have,

I have, upon another occasion, taken some notice of this short and imperfect report of *Benstead's* case, and observed that the prosecution against him appeareth to have been carried on with uncommon expedition, not to say with some degree of precipitancy: and probably the forcing of prison-doors, *as many were forced during the tumult*, was given in evidence on his trial, among other outrages of the night, as overt-acts of levying war, the species of treason for which he stood indicted.

CHAP. I.  
Disc. I. c. 2. § 5.

The same rule of equity and natural justice the learned judge in another place applieth to the case of felonious escapes and rescues, and addeth, "If the principal offender be convicted and hath his clergy, I think the gaoler or rescuer shall never be put to answer the escape or rescue, *as the act necessary where the principal hath his clergy is thereby discharged*\*, for the rescuer and officer are a kind of accessories."

1 Hale 592.

He calleth them a kind of accessories, because there can be no felonious escape or rescue where no felony had been previously committed: but in strict, legal propriety they are not accessories to the original felony; for though a man should be committed for many felonies, yet the escape or rescue is considered as one single felony and is so charged.

1 Hale 599.

With regard to a person knowingly receiving and harbouring a traitor, the learned judge in the place lately cited argueth, That though he is in the eye of the law a principal traitor and shall not be said to be an accessory, *yet thus much he partaketh of an accessory*, his indictment must be special of the receipt and not of the principal treason. If he is indicted by a several indictment, he shall not be tried till the principal be convicted; if in the same indictment with the principal, the jury must be charged to inquire first of the principal offender, and if they find him guilty, then of the receipt; and if the

1 Vol. c. 21.

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\* The 1st of Q. Anne hath provided for this case and for the case of a pardon of the principal after conviction. But in the treasons of the accessory kind already mentioned, and which will be mentioned, I do not conceive that any rule of equity or natural justice would be infringed by giving the rule, *"That in treason there are no accessories, all are principals,"* it's utmost extent against every accomplice; though the principal offender should be pardoned or die after conviction and before attainder. I shall enlarge a little as to this point in the case of accessories in felony in it's proper place.

Self. 2. c. 9.

principal

## CHAP. I.

principal be not guilty, then to acquit both; for though in the eye of the law they are both principals in treason, yet in truth he (the receiver) is so far an accessary that he cannot be guilty if the principal be innocent.

4 St. Tr. 130.

In the case of Mrs. *Lisle*, whose hard fate it was to fall into the hands of perhaps the worst judge that ever disgraced *Westminster-hall*, no regard was paid to this doctrine. I would not be thought to mention this case as an authority, upon which a doubt can at this day be possibly raised. I do it for the sake of what happened afterwards, which I take to be an authority with me. Her attainder was afterwards reversed in Parliament; and the act reciteth among other hardships of her case, "That she was, by an irregular and undue prosecution, indicted for entertaining and concealing *John Hicks* a false traitor knowing him to be such; though the said Hicks was not at the time of the trial attainted or convicted of any such crime."

1 Hale 613.

2 Hale 223.

The same learned author in other parts of his work argueth to the purpose for which I have already cited him; and applieth the same rule of equity to the case of a person indicted for contriving, abetting, aiding, or consenting to treason, which happeneth never to have been carried into execution.

But here we must distinguish, though the learned judge, speaking in general terms apposite to his present purpose, doth not. For with regard to every instance of incitement, consent, approbation, or previous abetment in that species of treason which falleth under the branch of the statute touching the compassing of the death of the King, Queen, or Prince, every such treason is in it's own nature, independently of all other circumstances or events, a complete overt-act of compassing; though the fact, originally in the contemplation of the parties, should never be effected, nor so much as attempted. *A.* inciteth *B.* to a treason of this kind, *B.* in abhorrence of the crime, and from a just sense of the duty which every man oweth to his King and country, and which every good man in the like circumstance will pay, maketh a discovery, by means whereof *A.* is brought to justice. This incitement on the part of *A.* is a complete overt-act of treason within this branch

of



of the statute, and hath no sort of connection with or necessary dependence upon the future behaviour of *B*: and therefore whatever the learned author hath advanced in general terms touching fruitless, ineffectual advice or incitement to treasonable practices must be understood of such treasons only as do not fall within this branch of the statute.

SECT. 2. I come now to consider the case of accomplices in felony.

SECT. 2.

Where two or more are to be brought to justice for one and the same felony, they are considered in the light either of principals in the first degree, as having actually and with their own hands committed the fact; or of principals in the second degree, as having been present aiding and abetting at the commission of it; or of accessaries before or after the fact.

Principals in the first and second degrees in felony.

The distinction between principals in the first and second degrees, or, to speak more properly, the course and order of proceeding against offenders founded on that distinction, seemeth to have been unknown to the most antient writers on our law; who considered the persons present aiding and abetting in no other light than as accessaries AT the fact, and consequently not liable to be brought to trial till the principal offenders should be convicted or outlawed.

This seemeth to be agreed by the best of our modern writers; and therefore I will not spend time in transcribing many authorities from the antients. One or two I will briefly cite and refer to others.

(1 Hale 437, 440.)

*Bracton* \*, speaking of the course of proceeding where the principal offender is not amenable to justice, saith, "*Appellati vero de forcía salvo attachientur quousque appellati de facto convincantur*:" but where all are amenable †, "*Procedatur contra omnes per ordinem; dum tamen illi de forcía non respondeant antequam factum convincatur*."

*Fleta* speaketh to the same purpose and almost in *Bracton's* words: and *the Mirror* in enumerating the several

Lib. 1. c. 31. l. 8.

\* *De Coron. c. 8. f. 3. and, c. 12. f. 9. to the end of the chapter.*

† *C. 19. f. 4 & 5. and to the same purpose see 4 E. 1. f. 2. de Officio Coronatorii.*

CHAP. I. sorts of accessaries, among others, mentioneth, "*ceux que sont*  
C. 1. l. 13. "*en la force.*"

I have here taken it for granted, that by the *appellati de forciâ* these authors meant persons present aiding and abetting. The appeal *de forciâ* proveth this beyond the possibility of a contradiction. "A. *appellat* B. *de forciâ, quod idem* B. *venit cum prædicto* C. (the perpetrator) & *tenuit ipsum* D. (the de-  
"ceased) *quamdî ipse* C. *illum interfecit.*" In the case of rape the appeal *de forciâ* is to the same purpose \*, *mutatis mutandis*; plainly importing that the defendant was present aiding and abetting at the fact.

I am aware of the sense *Coke* putteth upon the words, "commandment, *force*, aid, or receipt," in his comment on the statute of *Westm. 1.*, *That none of them import more than the offence of accessaries before or after the fact*: and I admit, that they must now be so understood, though the original import of the word *force* in the act was confined to those we now call principals in the second degree; but the great inconvenience of the rule I have mentioned touching the course and order of proceeding against accomplices in felony, tending, as it plainly did, to the total obstruction of justice in many cases and to great delays in others, induced the judges, from a principle of true political justice, to come into the rule now settled, *That all persons present aiding and abetting are principals.*

This rule was not thoroughly established till after the time of *Edward* the third: and so late as the first of *Queen Mary* a chief-justice of *England* greatly doubted of it: though indeed it had been sufficiently established, and the distinction between principals in the first and second degrees was well known long before that time.

Nothing needeth to be said by way of explanation touching principals in the first degree. What acts of concurrence are necessary to render a person a principal in the second degree, *viz.* as an aider and abettor, is now to be considered.

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\* *Brañ. de Coron. c. 28. f. 4 & 5.* and to the same purpose see in c. 21. f. 3. the defendant's oath upon joining battle in an appeal.

CHAP. I.  
Sect. 3.  
Prefence generally necessary.

SECT. 3. He must be present at the perpetration, otherwise he can be no more than an accessory before the fact; except in some special cases founded in necessity and political justice, I mean that justice which is due to the publick, *ne maleficia remaneant impunita*.

*A.* with intention to destroy *B.* layeth poison properly disguised in his way, *B.* taketh it and dieth. *A.*, though absent when the poison was taken, is a principal: and if this had been done at the instigation of *C.*, he if absent would have been no more than an accessory in the murder; unless they had both mingled the poison and laid it in the way of *B.*, for in that case both of them would have been principals, each of them having gone as far as the other towards perpetration.

Kel. 52, 53.

If *A.* had prepared the poison and delivered it to *D.* to be administered to *B.* as a medicine, and *D.* accordingly, in the absence of *A.*, had administered it *not knowing that it was poison*, and *B.* had died of it, *A.* would have been a principal in the murder, upon the same foot of necessity; for *D.* being innocent *A.* must have gone wholly unpunished if he could not have been considered as a principal. But if *D.* had known of the poison as well as *A.* did, he would have been a principal in the murder, and *A.*, if absent, an accessory before the fact; for the rule of necessity already mentioned doth not here take place.

1 Hale 616.

The law is the same in the case of inciting a madman, or a child, not at years of discretion, to commit murder or other felony in the absence of the person inciting: and therefore in the case of *Anne Courfe* reported before, who was indicted as an accessory before the fact, it was very properly stated by the learned judge before whom she was convicted, that the daughter who committed the fact at the instigation of the mother was of the age of 14, and of sufficient discretion; for had the mother employed, as she threatened she would, the least of her children, she must have been indicted as the principal, since the child, not being of years of discretion, would have been innocent.

(1 Hale 514, 617.)

P. 113.

SECT. 4. When the law requireth the presence of the accomplice at the perpetration of the fact, in order to render him

Sect. 4.  
Not always an immediate presence.

## CHAP. I.

him a principal, it doth not require a strict, actual, immediate presence, such a presence as would make him an eye or ear witness of what passeth.

Several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned him; some to commit the fact, others to watch at proper distances and stations to prevent a surprize, or to favour, if need be, the escape of those who are more immediately engaged. They are all, provided the fact be committed, in the eye of the law present at it: for it was made a common cause with them, each man operated in his station at one and the same instant towards the same common end; and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to insure the success of their common enterprise.

I will not here multiply cases upon the head of constructive presence. This may be sufficient by way of illustration. Others founded in the same principle of mutual concert, aid, and protection will fall in in their proper places.

Sect. 5.  
Present aiding  
and abetting.

SECT. 5. In order to render a person an accomplice and a principal in felony, he must be aiding and abetting at the fact, or ready to afford assistance, if necessary: and therefore if *A.* happeneth to be present at a murder for instance, and taketh no part in it, nor endeavoureth to prevent it, nor apprehendeth the murderer, nor levyeth hue and cry after him; this strange behaviour of his, though highly criminal, will not of itself render him either principal or accessory.

Dalt. 395.  
Stanh. 40. F.

I would be here understood to speak of that kind of homicide amounting *in construction of law* to murder, which is usually committed openly and before witnesses: for in the case of assassinations done in private, to which witnesses, who are not partakers in the guilt, are very rarely admitted, the circumstances I have mentioned may be made use of against *A.* as evidence of consent and concurrence on his part; and in that light should be left to the jury, if he be put upon his trial.

CHAP. I.

Sect. 6.

All present at murder in prosecution of any unlawful purpose murderers.

Kel. 116.

SECT. 6. But if a fact amounting to murder should be committed in prosecution of some unlawful purpose, *though it were but a bare trespass*, to which *A.* in the case last stated had consented, and he had gone in order to give assistance, if need were, for carrying it into execution; this would have amounted to murder in him, and in every person present and joining with him. The law would be just the same though the party slain had been an utter stranger and had taken no part on either side, but had come with a friendly intention towards both, and to accommodate matters between them.

It is true, here might be no special malice against the party slain, nor deliberate intention to hurt *him*; but if the fact was committed in prosecution of the original purpose, *which was unlawful*, the whole party will be involved in the guilt of him who gave the blow. For in combinations of this kind the mortal stroke, though given by one of the party, is considered in the eye of the law, and of sound reason too, as given by every individual present and abetting. The person actually giving the stroke is no more than the hand or instrument, by which the others strike,

And therefore where the indictment chargeth, that *A.* gave the mortal stroke, and that *B.* and *C.* were present aiding and abetting; if it cometh out in evidence, that *B.* was the person who gave the stroke, and that *A.* and *C.* were present aiding and abetting, they may be all found guilty of murder or manslaughter at common-law, as circumstances may vary the case. The identity of the person supposed to have given the stroke is but a circumstance, and, in this case, a very immaterial one; the stroke of one is in consideration of law the stroke of all. But in a prosecution on the statute of stabbing it is otherwise for a reason I have already given.

1 Hale 437, 463.  
2 Hale 344, 345 (1892.)

R. 301.

SECT. 7. I have, by way of caution, supposed, that the murder was committed *in prosecution of some unlawful purpose*, some common design, in which the combining parties were united, and for the effecting whereof they had assembled; for unless this shall appear, though the person giving the mortal blow

Sect. 7.

It must appear to be in prosecution of the unlawful purpose.

CHAP. I.

Kel. 111.

blow may himself be guilty of murder, (he may possibly have conceived malice against the deceased and taken the opportunity which the confusion of a crowd or darkness of the night afforded to execute his private revenge,) he, I say, may be guilty of murder, or, if it were upon a sudden quarrel, of manslaughter; and yet the others who came together for a different purpose will not be involved in his guilt: and therefore in *Plummer's* case this circumstance not being found by the special verdict, nor any other fact found from which the court could with certainty draw the conclusion, that the gun was discharged in prosecution of the design in which the gang was united, *Plummer* was discharged.

In that case the verdict stated, that *Plummer* and his accomplices were assembled in order to transport wool of the growth of *England* to *France* contrary to the statute; that an officer of the crown duly authorized for that purpose met and opposed them, and that, during the scuffle which ensued, a gun was discharged by one of the offenders, and *John Harding* one of the same gang was killed. The question was, whether *Plummer* and the rest of his party were guilty of this murder,

It was agreed by the court, 1st, That had the King's officer or any of his assistants been killed by the shot, it would have been murder in all the gang. 2d, That had it appeared, that the shot was levelled at the officer or any of his assistants, this likewise would have amounted to murder in the whole gang, though an accomplice of their own happened to be killed; for the malice *egreditur personam*: but this fact not having been certainly found, the prisoner was discharged.

I take it, that the point, on which the case turned, was this; it did not appear, from any of the facts found, that the gun was discharged in prosecution of the purpose for which the party was assembled. But had it been positively found, that it was discharged against the officer or his assistants, the court upon this finding might, without inroaching on the province of the jury, have presumed, that it was discharged in prosecution of their original purpose. In cases so circumstanced, *res ipsa loquitur*.

A. beat

*A.* beat a constable in the execution of his office; but, company interposing, they were parted and he desisted. *B.*, a friend of *A.*, rushed suddenly in and took up the quarrel, and fell upon the constable, who, in the struggle, was killed, *A.* *having not been at all engaged after they were parted.* It was holden by *Holt* and *Rokeby* at *Hartford* affizes murder in *B.*, but that *A.* was innocent. For it did not appear, that *A.* and *B.* had *previously* agreed upon offering any violence to the constable, or to obstruct him in the execution of his office. The murder was not committed in consequence of any unlawful combination between them.

CHAP. I.  
MS. Tracy.

Three soldiers\* went together to rob an orchard; two got upon a pear-tree, and the third stood at the gate with a drawn sword in his hand. The owner's son coming by collared the man at the gate and asked him what business he had there, and thereupon the soldier stabbed him. It was ruled by *Holt* to be murder in him; but that those on the tree were innocent. They came to commit a small inconsiderable trespass, and the man was killed upon a sudden affray without their knowledge. "It would, said he, have been otherwise, if they had all come *thither with a general resolution against all opposers.*"

This circumstance, I think, would have shewn, that the murder was committed in prosecution of their original purpose; but that not appearing to have been the case, those on the tree were to be considered as mere trespassers; their offence could not be connected with that of him who committed the murder.

SECT. 8. A general resolution against all opposers, whether such resolution appeareth upon evidence to have been actually and explicitly entered into by the confederates, or may be reasonably collected from their number, arms, or behaviour at or before the scene of action,—such resolutions so proved have always been considered as strong ingredients in cases of this kind. And in cases of homicide committed in consequence of

Sect. 8.  
General resolution against opposers.

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\* *Serum*, *Lent* affizes 1697. MSS. *Denton* and *Chapple*.

## CHAP. I.

them, every person present in the sense of the law, when the homicide hath been committed, hath been involved in the guilt of him that gave the mortal blow.

The cases of Lord *Dacres* \* mentioned by *Hale*, and of *Pudsey* † reported by *Crompton* and cited by *Hale* turned upon this point. The offences they respectively stood charged with as principals were committed far out of their sight and hearing; and yet both were holden to be present. It was sufficient, that, at the instant the facts were committed, they were of the same party and upon the same pursuit, and under the same engagement and expectation of mutual defence and support with those who did the facts.

But *A. B.* and *C.* ride out together with intention to rob on the highway. *C.* taketh an opportunity to quit the company, turneth into another road, and never joineth *A.* and *B.* afterwards. They upon the same day commit a robbery. *C.* will not be considered as an accomplice in this fact. Possibly he repented of the engagement, at least he did not pursue it; nor was there at the time the fact was committed any engagement or reasonable expectation of mutual defence and support, so far as to affect him.

Sect. 9.  
If the design  
was lawful, the  
whole party  
may not be  
guilty.

SECT. 9. With regard to assemblies of this kind, where the whole party may be involved in the guilt of one or more, I have already supposed, that such assemblies were formed for carrying some common purpose, *unlawful in itself*, into execution. For if the original intention was lawful and prosecuted by lawful means, and opposition is made by others, and one of the opposing party is killed in the struggle; in that case the person actually killing may be guilty of murder or manslaughter, as circumstances may vary the case; but the persons engaged with him will not be involved in his guilt, *unless they actually aided or abetted him in the fact*; for they assembled for another purpose, *which was lawful*, and consequently the guilt of the person actually killing cannot, by any fiction of

\* 1 *Hale* 439. (443—445.)

† *Crompt.* 34. a. b. 1 *Hale* 534. (537.) See 1 *And.* 116. the case differently reported.

law,



law, be carried against them beyond their original intention.

CHAP. I.  
Hale 444, 445.

SECT. 10. I will now proceed to another point falling naturally under this head touching aiders and abettors present at the fact.

SECT. 10.  
Are principals  
in the first and  
second degrees  
to be *always*  
punished alike?

It is admitted and cannot be denied, that these persons are, to some purposes, considered as principals in the felony, but principals in the second degree. Whether to all purposes and in all cases they are so considered deserveth some farther inquiry.

For with regard to new felonies created by statutes which take away clergy from those who shall be guilty in such manner and under such circumstances as are therein particularly set forth, without express mention of aiders and abettors *or any words which manifestly extend to them*, whether mere aiders and abettors shall likewise in the construction of such statutes be ousted, is a point which, I conceive, deserveth great consideration. And the question, I conceive, will turn, not barely upon any general rules of law touching aiders and abettors, but upon the special penning of the several statutes, and the rules of law which enter into the construction of them.

Cases without number may be cited to shew in general, how extremely tender the judges have been in the construction of statutes which take away clergy; sometimes even to a degree of scrupulosity excusable only in favour of life.

I will confine myself to a few, which I take to be more apposite to the present question, in order to shew, how, with regard to *the allowance or non-allowance of clergy*, they have carefully distinguished between the cases of principals in the first and second degrees, the actual perpetrators and mere aiders and abettors.

In the case of the King against *Page* and *Harwood* upon the statute of stabbing, which enacteth, "That every person "which shall stab or thrust,"—these defendants were present aiding and abetting a third person not named by the reporters, who in fact did make the thrust and was denied his clergy. But the defendants, though agreed to have been principals in manslaughter at common-law, were admitted to their

Aleyn 43.  
Stile: 86.

## CHAP. I.

clergy. For, saith the report, though in judgment of law every one present and aiding is a principal, yet in the construction of this statute which is so penal, it shall be extended only to such as *really and actually made the thrust*; not to those who in construction of law only may be said to make it.

This case is cited with approbation by *Hale* and by *Holt*, and was never yet denied to be law \*.

The same rule of construction prevailed in the case of *Evans* and *Finch* upon the statute of the 39 *Eliz.* c. 15. against robbery in dwelling-houses †. They both put up a ladder against the chamber-window, *Evans* opened the window, got into the chamber and stole 40 *l.* *Finch* stood on the ladder in the view of *Evans*, saw him in the chamber, assisted in the robbery, and had a share of the booty, but *did not enter the chamber*; and upon that account *alone* he, though plainly a principal present and abetting, had his clergy, and *Evans* had judgment of death.

‡ *Hale* 527,  
528, 537.

For, saith *Hale*, after citing this case, it must be a stealing *IN* the house: and therefore he that stealeth or is party to the stealing being out of the house is not ousted of his clergy.

c. 9.

Thus the law stood with regard to this statute, and to 5 & 6 *E. VI.* c. 9. against an offence of the like kind, till by 3 & 4 *W. & M.* aiders and abettors were expressly ousted.

c. 4.

The same rule of construction did always govern, and doth to this day ‡ govern, in the case of larceny *clam & secretè a personâ*, upon the statute of the 8th of *Eliz.* The person who actually picketh the pocket is ousted, not he who is present aiding and abetting, though without some accomplice ready at hand to take off the booty this sort of theft seldom succeedeth.

‡ *Hale* 529.

For, saith *Hale*, this statute shall be taken literally.

I will now apply these cases, which, I think, have hitherto stood the test and criticism of all succeeding times, to the present question. *Page* and *Harwood* were undoubtedly principals in the manslaughter; the thrust, made by him who

\* See 1 *Hale* 468. and other places, and the case of the Queen against *Whistler* reported *Salk.* 542. *Fur.* 129. 2 *Ld. Raym.* 842.

† *Cro. Car.* 473. cited likewise by *Holt* in *Whistler's* case.

‡ (See the cases of *Innis* and *Stern* in *Leach* 7, 8.)

was denied his clergy, was in construction of law made by every man present and abetting. *Finch* was likewise a principal in the robbery; the entry of *Evans* was in construction of law the entry of *Finch*. It is so holden every day in the case of burglary at common-law, where an actual entry of some kind or other is equally necessary. Why therefore did not a constructive thrust in one case, and a constructive entry in the other, operate so as to oust the accomplices present and abetting of clergy? The reason is plain and hath been already hinted at, the judges were upon the construction of statutes very penal, which were to be taken literally and strictly; aiders and abettors are not named or described, and therefore could not, as they conceived, be brought within the statutes.

SECT. II. The construction which hath been constantly put upon the statutes ousting clergy in murder, robbery, rape, and burglary hath been different. Aiders and abettors present have been always ousted, and, I admit, they ought to be so.

Sect. II.  
In some cases  
they are.  
(1 Hale 537.  
2 Hale 359.)

The same construction hath been put upon the statute against buggery.

But these cases widely differ from those I have cited. In those aiders and abettors are not once named; nor *are they described by any terms importing that the legislature intended to oust them*. In the others, the legislature hath made use of terms which, at the time of making the acts and long before, were well known to include them.

"No person," saith the act of E. VI., "that hath been or shall be convicted of murder of malice premeditated—or of robbing any person in or near the highway—shall be admitted to have the benefit of clergy."

1 E. 6. c. 12.  
§ 10.

"If," saith the statute of Eliz., "any person shall fortune to commit any felonious rape, ravishment, or burglary and to be found guilty—he shall suffer death without benefit of clergy."

18 Eliz. c. 7.

By these statutes clergy is taken away from the several offences described by legal, technical terms of well-known signification, *murder, robbery, rape, and burglary*.

## CHAP. I.

This observation may possibly be thought a little too nice and critical. But, critical as it may appear to common readers, it hath been countenanced by great authority\*; and hath always had great weight in questions touching the allowance or non-allowance of clergy.

One instance of this legal nicety, if it must be so called, I will mention; the reader's own observation hath, I doubt not, furnished him with more. The statutes which take away clergy from persons *convicted* of the offences which are the objects of them are well known not to have extended to persons outlawed, standing mute, challenging peremptorily above the legal number, or not answering directly to the charge. This great defect, owing to mere oversight or inaccuracy of expression, the judges have never attempted to cure; but the legislature hath, by many subsequent acts, which need not to be particularly cited, interposed and applied the proper remedy.

And if a statute hath happened to use the words *convicted by VERDICT*, the case of a confession hath likewise been considered as *casus omiffus*. For statutes taking away clergy must, say all the books, in the construction of them be literally and strictly pursued. On the other hand, where the statute taketh away clergy from the OFFENCE *generally without other circumstance*, it is taken away from the offender under every circumstance, in which his case may be considered.

(See 4 Term  
Rep. 521—  
543.)

But this point will not rest here. For let me ask, who are declared to be the objects of these acts? Persons *convicted* of murder, robbery, rape, or burglary. And who at the time these statutes were made were liable to be convicted as principals in those offences, and were universally known to be so? Undoubtedly aiders and abettors present. Consequently they fall within the letter of the acts and must be the objects of them.

So with regard to clergy in the case of buggery, it is taken from the offence under a term of certain well-known import and from all persons offending therein. "Forasmuch as there is no sufficient and condign punishment for the detestable vice of buggery with mankind or beast; Be it enacted, that

25 H. VIII.  
c. 6. revived by  
5 Eliz. c. 17.  
(1 Hale 669,  
670.)

\* See Lord Holt's argument in *Whistler's* case cited before, as reported by Lord Raymond and Farrelly; (and Blackstone's Comment. iv. c. 28. § 3.)

“the *same offence* shall from henceforth be adjudged felony; and that no person offending in any such offence shall be admitted to his clergy.” These words, *offending in such offence*, are large enough to include the case of every person present and assisting at such a scene of detestable lewdness; and probably were chosen by the legislature for that purpose, as the word *person* was, in Lord *Coke*’s opinion, in order that both sexes offending in that offence might be included. 3 Inst. 59.

SECT. 12. I have already shewn, that, according to our oldest writers, aiders and abettors present were considered not as principals, but as accessaries *at the fact*; and have endeavoured to account for the introduction of the rule as it is now settled, that they are all principals.

Sect. 12.  
P. 347, 348.  
The distinction between principal and accessary is now of great consequence.

The sole motive to this alteration seemeth to me to have been, that aiders and abettors present might be brought to their trials while the fact was recent and most capable of proof, though the actual immediate perpetrators should not be then amenable: and I am greatly strengthened in this opinion by what is disclosed in the cases already cited to this point from the year-books, and those added in the margin \* wherein this matter came under consideration. The persons who gave the mortal wounds, (for they were all cases of murder,) were fled from justice, and only the persons present and abetting amenable; and probably in the other cases † the fact might be so, though the reporters are silent as to that circumstance.

For I am very clear, that the distinction between principals and accessaries of any kind did not, at the time the present rule was established, *affect the life of the party* upon a conviction; since, as I have elsewhere shewn, all were at that time alike liable to suffer death, from the principal in the first degree to the accessary in the lowest, unless the privilege of clergy, which in those days was founded solely on the clerical function or capacity of the delinquent, interposed. P. 302.

But in the construction of statutes which take away clergy, the question *at present*, whether principal or accessary, is a

\* 25 E. III. 44. b. 21 E. IV. 71. a.  
20. a.

† 4 H. VII. 13. a. 13 H. VII.

CHAP. I. matter of extreme consequence to the prisoner; it is life or death to him: and had a departure from the antient rule so far affected the prisoner's life upon a conviction, I am persuaded the judges would still have adhered to it, notwithstanding the inconveniences I have mentioned; till the legislature should have thought proper to interpose and provide a remedy.

This observation may possibly serve to determine the extent of the present rule, and at the same time to evince the wisdom and equity of the resolutions in the case of *Page* and *Harwood* and the others before cited. The judges admitted the rule, that all *present and abetting are principals*, in it's due latitude; but did not extend it, *in all it's possible consequences*, to the question touching the allowance or non-allowance of clergy, a question which did not exist, nor could possibly be in contemplation, in the light we consider it, at the time the rule was established \*.

## CHAP. II.

### Of Accessaries in Felony.

SECT. 1.  
F. 343, 345.  
Rules as to accessaries.

SECT. I. I HAVE already observed, that the offence of the accessory, though different from that of the principal, is yet in judgment of law connected with it and cannot subsist without it; and that, in consequence of this connection, the accessory shall not, *without his own consent*, be brought to trial till the guilt of the principal is legally ascertained by the conviction or outlawry of *him*, unless they are tried together; and that in this case the jury shall be charged to inquire first of the principal; and if they are satisfied of his guilt, then of the accessory; but that if the principal be not guilty, both must be acquitted.

These rules are plain and universally acknowledged, and require no farther proof or illustration.

The old books carry these rules much farther than the law in it's present state will admit of. For if a man had been indicted as accessory *in the same felony* to several persons,

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(\* See the case of the Coal-heavers in Leach 61. Seven men were convicted and executed in 1768 on the statute 9 Geo. I. c. 22, which EXPRESSLY takes away clergy only from those who maliciously shoot at another person, *about of them not having discharged a gun or pistol*. Ought not this very penal statute to have been construed *literally and strictly*?)

he could not have been arraigned till all the principals were convicted and attainted : but that point hath long been otherwise settled ; for, as the law now standeth, if a man be indicted as accessory to two or more, and the jury find him accessory to one, it is a good verdict, and judgment may pass upon him. CHAP. II. 9 Co. 119.

And therefore the court in their discretion may arraign him as accessory to such of the principals who are convicted ; and if he be found guilty as accessory to them *or any of them*, judgment shall pass upon him. But, on the other hand, if he be acquitted, that acquittal will not discharge him as accessory to the others : and when they come in and are convicted and attainted, or if judgment of outlawry passeth against them, he may be arraigned *de novo* as accessory likewise to them ; “ though,” saith *Hale*, “ it be the safer course to respite the arraignment of the accessory till all appear or are outlawed.” 1 Hale 624.

This caution he seemeth to ground on the rigour of the common-law in the case of an *appeal*. But in his 2d *vol.* he distinguisheth between that method of prosecution and an indictment. In the former the appellant was obliged to prove the defendant accessory to all the principals, *in manner as he had counted against him* ; but in the case of an indictment, that method of prosecution being at the suit of the Crown, he thinketh it sufficient, that he be found accessory to any of the principals : and to this purpose he citeth the authority I have just cited from 9th *Coke*. He was plainly of the same opinion when he compiled his summary. P. 201. Sum. 222.

I have already said, that notwithstanding the connection between principals and accessories, yet in consideration of law their offences are quite different. And for that reason, I presume, it is, that if *A.* be indicted as principal and *B.* as accessory, and both are acquitted, yet *B.* may be indicted as principal in the same offence, and his former acquittal is no bar. On the other hand, it seemeth to be agreed, *upon what grounds I know not*, that if *A.* be indicted as principal and acquitted, he cannot be afterwards indicted as accessory *before* the fact. *For*, say some, *it is in substance the same offence*. Others, if a man 1 Hale 625. (1 Hale 626. 2 Hale 244. 2 Hawk. 373.) Kel. 25, 26.

CHAP. II. man inciteth to the offence, *he is QUODAM MODO guilty of the fact.*

In *foro cæli* this is true. In the sight of God *Abab* was the actual murderer of *Naboth*. "Hast THOU," saith God to him by the prophet, "*killed* and also taken possession?—In the place where dogs licked the blood of *Naboth*, shall dogs lick thy blood, even thine." And in the case of *Uriab*, God, by another prophet, saith to *David*, "THOU hast killed *Uriah* the *Hittite* with the sword,—and slain him with the sword of the children of *Ammon*."

But is it also true *in foro sæculi*? By no means: for in the eye of the law the offences of principal and accessory *specifically* differ, and fall under a quite different consideration. The point in the case reported by *Kelyng*, which was of an accessory after the fact, was at length settled upon sound principles of law and reason. But the reasoning upon that case founded on a distinction between what preceeded or was subsequent to the fact is, I confess, too refined for my comprehension; and probably will continue so, till I can remove antient land-marks, and forget the legal distinction between principals and accessories, and every principle of law founded on it. For if the offences of the principal and accessory do, in consideration of law, *specifically* differ; and if a person indicted as principal cannot be convicted upon evidence tending *barely* to prove him to have been an accessory before the fact, which, I think, must be admitted; I do not see how an acquittal upon one indictment could be a bar to a second for an offence specifically different from it. In the case I first stated it was no bar, why therefore in the second?

(See the case of Samuel Atkyns in 2 St. Tri. 788.)

This I offer as a doubt of my own, which is submitted to the opinion of the learned.

SECT. 2.  
Some rules at common-law not well founded.

SECT. 2. There were at common-law some other rules touching the connection between principals and accessories, not, I doubt, perfectly well founded. For if the principal stood mute of malice, or challenged peremptorily above the legal number of jurors, or refused to answer directly to the charge, the accessory could not have been put upon his trial, *because,*



*because, say the books, the principal was not attainted.* These rules seem not to have been founded in the same natural justice or sound policy as those I first mentioned.

It would, I think, have been extremely difficult for a common understanding, *unpractised in artificial reasoning*, to have discovered, that the mere obstinacy of one incorrigible offender, an obstinacy too that exposeth him to the severest capital punishment the law knoweth of, should, by appointment of the same law, stop the course of justice against another: that the accessory, who frequently is the leader, contriver, and *real principal* in the villany, should be permitted to bid defiance to the justice of the kingdom, merely because the instrument employed by him cannot be prevailed upon to deny the charge, and put himself upon a legal trial: and yet this was the case with regard to felony till the statute of the 1st of Queen Anne

See 1 An. 681.  
2. c. 9.

With great submission to the wisdom of superiors, I think the remedy in this case might have been carried something farther. The mischief at that time in contemplation was, that, the principal not having been convicted or attainted, no trial could be had in order to the conviction of the accessory. This mischief the statute hath provided for: but had it enacted, at the same time, that in these cases the charge [against the principal] should be taken *pro confesso*; and that the like judgment should pass upon the defendant as upon a felon convicted by verdict or confession, in that case the remedy, besides meeting effectually with that single mischief, would have been better adapted to the case considered in every other light \*.

(See 12 Geo.  
III. c. 20.)

In all cases of high treason, if the defendant standeth mute of malice, or refuseth to answer directly to the indictment, this amounteth to a conviction; and accordingly judgment, as in cases of high treason, is given: and this judgment induceth a corruption of blood, and all the forfeitures and disabilities consequent upon it. This hath not, that I know of, been complained of as any hardship upon the criminal; nor can it be considered in that light: for it is nothing more

\* By 11, 12 W. III. c. 7. §. 6. the like provision is made in the cases provided for by that act.

than

CHAP. II. than a legal presumption in advancement of justice, *that the charge, which the criminal will not deny, and put into a legal method of trial, is founded in truth.*

But I find I am now getting out of my sphere, and therefore I will not enlarge.

The cases of admitting the principal to clergy, or his obtaining a pardon after conviction and before attainder, are likewise provided for by the statute I last cited. The accessory may be brought to justice notwithstanding the principal hath been so dealt with : and very proper was this provision ; for, in the scale of sound sense and substantial justice, the only questions in which the accessory can have any concern, *in common with the principal*, are, whether the felony was committed, and committed by the principal. These facts the conviction of the principal hath established with certainty, *at least sufficient to put the accessory to his answer* : and therefore in what manner the principal may have been treated after his conviction seemeth to me to be a matter perfectly foreign to the question, whether or when the accessory shall be brought upon his trial ; whatever notions of congruity and proportion in point of punishment, founded in the connection between them, may have been formerly entertained.

Sect. 3.  
P. 121.  
In what cases  
the accessory  
may controvert  
the guilt of  
the principal.

SECT. 3. At a conference among the judges upon the case of *McDaniel and others* before reported, a general question was moved how far and in what cases the accessory may avail himself of the insufficiency of the evidence in point of fact, or of the incompetency of witnesses in point of law, produced against the principal ; and in what cases he may be let in to shew, that the facts charged and proved against the principal do not in judgment of law amount to felony. There was in that case no occasion to enter far into these questions ; since the facts, upon which the point of law then under consideration must necessarily turn, were all found by the special verdict. The general question was therefore waved.

However, I will now submit to consideration a few things which have occurred to me upon it.

If the principal and accessory are joined in one indictment and tried together, which I conceive to be the most eligible course where both are amenable, there is no room to doubt whether the accessory may not enter into the full defence of the principal; and avail himself of every matter of fact and every point of law tending to *his* acquittal: for the accessory is in this case to be considered as *particeps IN LITE*, and this sort of defence necessarily and directly tendeth to his own acquittal.

CHAP. II.  
(See 2 Edw.  
VI. c. 24.)

This is too plain to admit of farther enlargement.

When the accessory is brought to his trial after the conviction of the principal it is not necessary to enter into a detail of the evidence, on which the conviction was founded. Nor doth the indictment aver, that the principal was in fact guilty. It is sufficient if it reciteth with proper certainty the record of the conviction. This is evidence against the accessory sufficient to put him upon his defence; for it is founded on a legal presumption, that every thing in the former proceeding was rightly and properly transacted: but a presumption of this kind must, I conceive, give way to facts manifestly and clearly proved; as against the accessory the conviction of the principal will not be conclusive; it is as to him *res inter alios acta*.

(It sometimes doth. See *Ld. Sanchar's case*, 9 Co. 118.)

And therefore if it shall come out in evidence upon the trial of the accessory, as it sometimes hath and frequently may, that the offence of which the principal was convicted did not amount to felony in him, or not to that species of felony with which he was charged, the accessory may avail himself of this, and ought to be acquitted. This was the case of *Mr. Daniel and others* lately cited. The youths who were convicted of the robbery, being totally ignorant of the conspiracy mentioned in the report of that case, took no advantage of it, and were convicted upon full legal evidence: but when the whole scene of villany came to be disclosed upon the trial of those miscreants, they were discharged from that indictment upon this single objection, that the offence of the principals did not in the eye of the law amount to robbery.

(See *Smith's case* in *Leach* 237.)

If this opinion was well founded in point of law, and shall stand the test of future times, as I think it will, every other person

## CHAP. II.

person in the like circumstances may, upon his trial, avail himself of it, and will be intitled to a verdict of acquittal.

I will by way of illustration put another case. *A.* is indicted for stealing a quantity of live fish the property of *B.* *A.* pleadeth guilty upon his arraignment, is immediately burnt in the hand, and discharged. At the next sessions *C.* is indicted as an accessary to *A.* in this felony after the fact, as the receiver knowingly. *A.* is produced as a witness against him, and, in the course of his evidence, proveth, that the fish were taken in a river of which *B.* had the sole and separate fishery, or in a large pond upon the waste of *B.* Might not *C.*, had he been so advised, have insisted, that the fish being at their natural liberty *B.* had no fixed property in them, and consequently that the taking of them *in that state* could amount to no more than a bare trespass? Undoubtedly he might \*.

Or let me suppose, that the principal is erroneously attainted, and thereupon the accessary is brought to his trial, convicted and attainted. The attainder of the principal is afterwards reversed for error. This reverseth the attainder of the accessary. It is true it hath been holden, that the accessary cannot take advantage of the error by way of plea; he cannot aver against the record of the attainder while it standeth unreversed: but *Brooke*, perhaps the most judicious of all the abridgers, after citing the case, addeth, *judex tamen debet habere discretionem & equitatem*. The accessary ought to have had a reasonable time to procure, if possible, a reversal of the attainder; as where a prisoner pleadeth a charter-pardon, which upon inspection appeareth not to reach his case, the court, presuming that the Crown intended an *effectual* pardon, will give him a reasonable time to obtain one.

How far the accessary can avail himself in point of fact by shewing that the principal was totally innocent is a question of more difficulty, and should be handled with great caution;

P. 67.

2 Hale 511.

\* *Hale*, it is true, doth in his Summary say, that taking fish in a trunk, net, or pond is felony; but in the work he intended for publication he is express, that larceny cannot be committed of fish in a river or pond. "If," saith he afterwards in the same page, "in a trunk or net, larceny may be committed of them." See to this point *Owen* 20. and 9 *Geo. I. c. 22.* which maketh it felony, under some special circumstances, to steal fish in a pond.

because

because facts, for the most part, depend upon the credit of witnesses; and when the strength and *hinge* of a cause happeneth to be disclosed, as it may be by one trial, daily experience convinceth, that witnesses for very bad purposes may be too easily procured. I will therefore, before I offer my own opinion, cite one or two authorities, which, in my apprehension, are strong in favour of the accessory upon the foot of the *mere innocence of the principal*.

I observed before, that the accessory may, if he choose it, be brought to his trial before the conviction or attainder of the principal. But in case he be convicted, "It seems, saith *Hale*, necessary to respite judgment till the principal be convicted and attainted; for if the principal be after acquitted, that conviction of the accessory is annulled, and "no judgment ought to be given against him." P. 343. 1 Hale 612.

The principal is outlawed, and thereupon the accessory is tried, convicted, and executed. The principal afterwards cometh in, reverseth the outlawry and pleadeth over to the felony, and upon trial is acquitted. This, saith *Coke*, reverseth the attainder of the accessory. 9 Co. 119.

I have already premised, that in order to convict the accessory it is not necessary to enter into the detail of the evidence upon which the principal was convicted; and have offered some reasons for my opinion. Another weighty reason occurreth, which it will be sufficient just to mention. The witnesses against the principal may be dead, or not to be found, when the accessory is brought upon his trial; especially after a long interval between the trials. P. 365.

But still if it shall manifestly appear in the course of the accessory's trial, that in point of fact, (the point of law where the legal presumption is equally strong against the accessory. I have already spoken to,) if, I say, it shall appear, that the principal was innocent, common justice seemeth to require, that the accessory should be acquitted. *A.* is convicted upon circumstantial evidence, strong as that sort of evidence can be, of the murder of *B.* *C.* is afterwards indicted as accessory to this murder; and it cometh out, upon the trial, by incontestable evidence, that *B.* is still living, Lord *Hale* somewhere

## CHAP. II.

somewhere mentioneth a case of this kind, is *C.* to be convicted or acquitted? The case is too plain to admit of a doubt. Or suppose *B.* to have been in fact murdered, and that it should come out in evidence, *to the satisfaction of the court and jury*, that the witnesses against *A.* were mistaken in his person, a case of this kind I have known, that *A.* was not nor could possibly have been present at the murder.

It must be admitted, that mere *alibi* evidence lieth under a great and general prejudice, and ought to be heard with uncommon caution: but if it appeareth to be founded in truth, it is the best negative evidence that can be offered; it is really positive evidence, which in the nature of things necessarily implieth a negative: and in many cases it is the only evidence an innocent man can offer. What in the case I have put are a court and jury to do? If *they are satisfied, upon this evidence, that A. was innocent*, natural justice and common sense will suggest what is to be done in the case of *C.*

These, it may be said, are strong cases, and seldom happen in experience. I confess they are strong, and for that very reason, since I am upon a subject of some delicacy, and which should be treated with great caution, I have made choice of *them*: but if they prove, that in any cases whatsoever the legal presumption against the accessory, founded on the conviction of the principal, may be repelled by contrary evidence, they prove as much as I expected from them. The rule is right, the difficulty will lie in the application of it to particular cases. How far it is to be carried to cases probably not equally strong, must, all circumstances duly weighed and considered, be left to the prudence, circumspection, and abilities of the learned judges before whom the several cases may happen to come in judgment.

I forbear entering farther into this question.

## CHAP. III.

**I** WILL now briefly submit to consideration a few things touching accessaries, considered under the well-known distinction of accessaries before and after the fact.

**P. 121.**

**Sect. 1.**  
**Principal sub-**  
**stantially vari-**  
**eth.**

**Sect. 2.**  
**Or in circumstance**  
**only.**

**A 2**

**the**

CHAP. III. the object principally in his contemplation, and that is effected.

SECT. 3.  
He exceeds the orders.

SECT. 3. So where the principal goeth beyond the terms of the solicitation, *if in the event the felony committed was a probable consequence of what was ordered or advised*, the person giving such orders or advice will be an accessory to that felony. *A.*, upon some affront given by *B.*, ordereth his servant to way-lay him and give him a sound beating; the servant doth so, and *B.* dieth of this beating. *A.* is accessory to this murder.

*A.* adviseth *B.* to rob *C.*, he doth rob him, and in so doing, either upon resistance made, or to conceal the fact, or upon any other motive operating at the time of the robbery, killeth him. *A.* is accessory to this murder.

Or *A.* soliciteth *B.* to burn the house of *C.*; he doth it; and the flames taking hold of the house of *D.* that likewise is burnt. *A.* is accessory to the burning of this latter house.

These cases are all governed by one and the same principle. The advice, solicitation, or orders in substance were pursued, and were extremely flagitious on the part of *A.* The events, though possibly falling out beyond his original intention, were *in the ordinary course of things the probable consequences of what B. did under the influence, and at the instigation of A.* And therefore, in the justice of the law, he is answerable for them.

SECT. 4.  
Being advised to murder A. he murders B.  
1 Hale 617.  
3 Inst. 34.

SECT. 4. It hath been said, that if *A.* ordereth *B.* to kill *C.*, and he *by mistake* killeth *D.*, or aiming his blow at *C.* misseth him and killeth *D.*, *A.* will not be accessory to this murder; "*because it differeth in the person.*" This is a merciful opinion: but I cannot think, that the case of *Saunders*, cited in support of it, doth warrant the rule in the latitude here laid down.

It however suggesteth a point which may possibly merit consideration. *B.*, in the case put by the learned authors last cited, is an utter stranger to the person of *C.*, *A.* therefore taketh upon him to describe him by his stature, dress, age, complexion, &c. and acquainteth *B.* when and where he may probably be met with. *B.* is punctual at the time and place,  
and



and *D.*, a person possibly in the opinion of *B.* answering the description, unhappily cometh by and is murdered, upon a strong belief on the part of *B.* that this is the man marked out for destruction. Here is a lamentable mistake; but who is answerable for it? *B.* undoubtedly is; the malice on his part *egreditur personam*. And may not the same be said on the part of *A.*? The pit which he, with a murderous intention, dug for *C.*, *D.* through his guilt fell into and perished. For *B.*, not knowing the person of *C.*, had no other guide to lead him to his prey than the description *A.* gave of him. *B.* in following this guide fell into a mistake, which it is great odds any man in his circumstances might have fallen into. I therefore, as at present advised, conceive, that *A.* was answerable for the consequence of the flagitious orders he gave; since that consequence appeareth, in the ordinary course of things, to have been highly probable. This opinion I ground upon the reason of the cases stated in the last section.

*Saunders's* case referred to by the learned authors was not more than this. He, with intention to destroy his wife, by the advice of one *Archer*, mixed poison in a roasted apple, and gave it to her to eat. She having eaten a small part of it gave the remainder to their child. *Saunders* at this dreadful moment made a faint attempt to have saved the child; but, conscious of the horrid purpose of his own heart, and unwilling to make his wife a witness of it, desisted, and stood by and saw the infant he dearly loved eat the poison, of which it soon afterwards died. It was ruled, without much difficulty, that *Saunders* was guilty of the murder of the child upon the reasons already given. With regard to *Archer*, it was agreed by the judges upon conference, that he was not accessory to this murder, it being an offence he neither advised nor assented to. The judges however did not think it advisable to deliver him in the ordinary course of justice by judgment of acquittal: but for example's sake they kept him in prison by frequent reprieves from session to session, till he had procured a pardon from the crown; a measure prudence will often suggest in cases of a doubtful or delicate nature.

CHAP. III.  
Plowd. 475.

But this case widely differeth from that I have put. And so doth another stated by *Plowden*. *A.* adviseth *B.* to burn the house of *C.* which house *B.* well knoweth. He spareth the house of *C.* and burneth the house of *D.* *A.* is not accessory to this felony.

The difference of the cases, I conceive, lieth here. In these, there was no mistake on the part of the father or of the incendiary, for which their advisers could be any way responsible. The father stood by and suffered the child to eat the poison prepared for the mother; the incendiary wilfully and knowingly varied from his orders, and sparing one house destroyed the other. But in the case I have supposed, the assassin, not knowing the man marked out for destruction, was misled by the directions *A.* gave him.

I believe the following criteria will let the most inquisitive reader into the grounds upon which the several cases falling under this head will be found to turn. Did the principal commit the felony he standeth charged with under the influence of the flagitious advice; and was the event, in the ordinary course of things, a probable consequence of that felony? Or did he, following the suggestions of his own wicked heart, wilfully and knowingly commit a felony of another kind or upon a different subject?

SECT. 5.  
Accessories after the fact.

(See 18 G. II.  
c. 27.)

SECT. 5. I shall be very brief upon the general principles of law touching accessories after the fact; because prosecutions for this offence, grounded on the common-law, have not been frequent, nor have they had any great effect. For as the law now standeth and practice hath governed, prosecutions of that kind, except in a case I shall presently mention, generally end in a slight punishment, if it can be called by that name; or rather a piece of absurd pageantry, tending neither to the reformation of the offender, nor for example to others. I mean what is called burning in the hand, with an iron scarcely heated.

1 Eliz. c. 12.  
s. 5.

In the case of horse-stealing, it is true, the statute of *Elizabeth* hath taken away clergy as well from the accessory after, as before the fact; but it must be observed, that this statute extendeth

extendeth only to such persons as were in judgment of law accessaries at the time the act was made, namely accessaries at common-law; not to such as are made accessaries by subsequent statutes. And therefore a person knowingly receiving a stolen horse, who is made an accessary by some late statutes, is not outed. This was agreed by all the judges at a conference in *Easter* term in the second of Queen *Anne*.

CHAP. III.

MSS. Tracy  
and Dento.

SECT. 6. By the 3 and 4 *W. and M. c. 9.* and by the 5th of Queen *Anne, c. 31.* receivers of stolen goods knowingly are made accessaries after the fact: and by the 4 *Geo. I. c. 11.* they are liable to be transported for 14 years.

Sect. 6.  
Receivers of  
stolen goods.

Before the statute of King *William*, receivers, *unless they likewise received and harboured the thief*, were guilty of a bare misdemeanour; for which they were liable to fine and imprisonment, or other corporal punishment. But that act having made them accessaries and consequently felons, the prosecuting them as for a bare misdemeanour was holden by all the judges at a conference about the latter end of King *William's* reign to be improper and illegal. For the misdemeanour was merged and absorbed in the crime of felony; just as felony at common-law, when made high treason by statute, which hath been done in a few cases, is merged and absorbed in the treason.

MS. Tracy.

This was soon found to be inconvenient: for if the receiver, who generally is the employer and patron of the thief, could keep him out of the way, he [the receiver] passed unpunished. To remedy this mischief the 1st of Queen *Anne* provideth, that the receiver may be prosecuted as for a misdemeanour, *though the principal be not* BEFORE CONVICTED: and by the 5th of Queen *Anne* he may be so prosecuted, *though the principal cannot be* TAKEN *so as to be prosecuted and convicted.*

1 An. sess. 2.  
c. 9.

C. 31.

I know attempts have been made, under various shapes, to prosecute the receiver as for a misdemeanour, while the principal hath been in custody and amenable, *but not convicted.* But I think all devices of that kind are utterly illegal: for though the 1st of Queen *Anne* in the strict letter of it seemeth

CHAP. III. to be confined to the single case of the *non-conviction* of the principal, yet the subsequent statute, in order to make them both consistent, must be understood as explanatory of the former; since both acts plainly provide against one and the same mischief, viz. *where the principal abscondeth and is not amenable to justice*. Which the preambles of both shew to have been the mischief in the contemplation of the legislature at the time they were made.

See the preambles.

P. 1370. There is, I confess, a case in Lord *Raymond*, which seemeth to oppose what I have advanced\*. But the opinion said to have been given in that case weigheth very little with me; and if taken in the latitude the words seem to imply it is not law.

(See 29 Geo. II. c. 30. 10 Geo. III. c. 48. and 22 Geo. III. c. 58.)

Where the principal is amenable the prosecutor hath no option whether to proceed against the receiver as for felony or misdemeanour, he must proceed as for felony. If he be not amenable, and the prosecutor choose to wait for his conviction he may do so, and then proceed against the receiver as for felony; or at his own pleasure, as for a misdemeanour without waiting till the principal shall be amenable. Under these limitations, and these only, as I conceive, the prosecutor hath an option.

Besides, the judgment of the court in that case doth not appear to be founded on the opinion supposed to have been then given as *the ruling principle*, but on a much stronger and more rational motive. The court would not upon motion arrest judgment upon an exception to the indictment *which was never taken before*, and which must overset every judgment that had been given on the statute. This was a solid and a rational principle, founded in political justice: for in cases of this kind, *communis error facit jus*.

For the reasons already offered I shall enter no farther into the learning of accessaries after the fact.

The discourses of high treason and homicide would have been very imperfect if the learning of accomplices in the one, and of accessaries in the other had been left wholly untouched.

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\* See the same case wretchedly reported in 8 *Mod.* 264.

And I chose to throw my thoughts on these subjects into a separate discourse, rather than to blend them with what is offered under the general titles prefixed to the other discourses: for subjects which bear a near affinity to each other, as these do, are best understood when exhibited together in one point of view; because by that means they explain and illustrate each other.

CHAP. III.

This having been done as far as concerneth treason in the light I have considered it, and homicide in all it's branches, to which offences I have confined myself, I have nothing farther to offer.

END OF THE DISCOURSE  
ON ACCOMPLICES.

[illegible]

**D I S C O U R S E I V .**  
**O B S E R V A T I O N S**

**O N**

**S O M E P A S S A G E S**  
**I N T H E W R I T I N G S O F**  
**L O R D C H I E F - J U S T I C E *HALE*,**

**Relative to the Principles on which the Revolution  
and present happy Establishment are founded.**





# DISCOURSE IV.

## OBSERVATIONS

ON

Some Passages in the Writings of Lord Chief-Justice HALE, relative to the Principles on which the Revolution and present happy Establishment are founded.

**L**ORD Chief-Justice *Hale*, in his history of the pleas of the Crown, speaking of the depofal and refignation of *Edward II.*, is pleased to fay; “Although *Edward II.* 1 Vol. 105.  
 “had a kind of PRETENDED depofing, and his fon *Edward III.*  
 “took upon him the kingly name and office, yet in the opinion  
 “of thofe times *Edward II.* continued, as to fome purpofes, his  
 “regal character: for in the parliament of the 4th of *Edward*  
 “*III.* *Mortimer* and others had judgment of high treason given  
 “againft them for the death of *Edward II.* after his depofition.”—And a little lower, after citing the parliament-roll in the cafes of *Mortimer* and Sir *Thomas Berkley*, he addeth;  
 “This judgment (againft *Mortimer*) was not fingly upon this  
 “account, that he (*Edward II.*) was father to King *Edward*  
 “*III.*; but that notwithstanding the formal depofing of him,  
 “and that pretended or extorted refignation of the Crown  
 “mentioned by the histories of that age, yet they ftill thought  
 “the character *regius* remained upon him, and the murder of  
 “him was no lefs than high treason; namely, the killing of  
 “him WHO WAS STILL A KING, though deprived of the actual  
 “adminiftration of his kingdom.”

Mr. *Prynne* inferreth from thefe cafes, as his Lordfhip doth, that *Edward II.* after his depofition was ftill reputed a King Plea for the  
Lords, p. 329.  
460.  
*de jure.*

Thefe cafes undoubtedly prove, that, in the judgment of thofe times, the murder of *Edward II.* was high treason: but, with great deference to the opinion of the learned judge, it will not follow from thence, that this treason was confidered

as

as a breach of allegiance due to Edw. II; or that, when the treason was committed, he was, in the opinion of those times, intitled to the allegiance of the people of England.

Compassing the death of the Queen-confort, or of the King's eldest son and heir,—these, and some other offences against the blood-royal, were high treason at common-law and continue so since the statute. But against whom, in consideration of law, are these treasons committed? Plainly against the Crown and royal dignity of the King, against the *allegiance due to him*; though upon the persons of those who participate in some of the high prerogatives of the Crown; for it is of the essence of high treason, that it be done *contra ligeantiae debitum*.

De Coronâ, c. 3.  
f. 1. prope  
finem.

Cap. 20.

It is well known, that, long before the times now under consideration, personal violence, committed or attempted against the blood-royal, was considered in the same degree of guilt, as if done or attempted against the King himself. *Bracton*, speaking of offences against the person of the King, saith; "*Videndum est utrum transgressio illa quæ tangit regem gravis fuerit vel levis, sive sibi sive uxori et pueris*. In suis vero poterit rex injuriari." *Britten* is more explicit to the present purpose; "*En primes est a dire de appels de felonies que poient estre faits par nous et nemye pour nous, sicome de trefon et de compassment purveu vers nostre persone pour nous mettre a mort, ou nostre compagne, ou nostre pere ou nostre mere ou nos enfautz*."

3 Inst. 7.

Lord Chief-Justice *Coke* is clearly of opinion, that *Edw. II.* after his deposition was not to be considered in any other light than as a person utterly divested of the regal character; and consequently that the judgment against *Mortimer* and others was founded solely on this principle, that *the murder of the King's father was high treason*. His words are, "It appeareth by *Britten*, that to compass the death of the father of the King was treason; and so was the law holden after that: for after *Edw. II.* had dismissed himself of the kingly office and duty, and his son by the name of *Edw. III.* was crowned and King regnant, *Gourney* and *Ocle* were attainted of high treason

"treason for murdering the King's father, who had been a King by the name of *Edw. II.*"

It is certain, that, at the time of these attainders, there prevailed a very extensive rule touching offences against the blood-royal, I mean that cited before from *Bracton*, "*In suis vero potest non injuriari.*" for at the same Parliament *John Maltravers* and others were attainted of high treason for compassing the death of the King's uncle the Earl of *Kent*.

Rot. Parl. 4 Ed.  
III. No. 3 & 4.

It must be admitted, that in this instance matters were greatly strained against these men: for the Earl of *Kent* himself had been attainted and executed for treason or pretended treason against the King, at a Parliament holden at *Winchester* \* in this very year; and the charge against *Maltravers* and the others touching the Earl's death was, *That they by wicked arts and untrue suggestions imposed upon his credulity, and led him into measures which ended in his own destruction* †. This was deemed a compassing of the death of the King's uncle!

4 Rym. 424,  
430.

The only use I make of this case is, that since compassing the death of the King's uncle was high treason in the opinion of that Parliament, the same Parliament might, by parity of reason, adjudge the actual murder of the King's father to be so, without considering him as a person still invested with the regal character. The judgments in both cases most probably were founded on one and the same principle, the near relation *Edw. II.* and the Earl of *Kent* stood in to the King: especially since the Lords could proceed on no other principle with regard to the former, without supposing the King on the throne to have been an usurper during the interval between his accession and his father's death.

But whether the murder of *Edw. II.* was deemed high treason, as the murder of one who was still a King, though deprived of the actual administration of his kingdom, which Lord *Hale*

\* The roll of the Parliament at *Winton* is not extant. It was called by writ *Tells* the 25th of *January*, 4 *Edw. III.* returnable on *Sunday* before the feast of *St. Gregory* [*March 12th.*]

† See in 1 *Hale* 82. the record of this judgment, which hath been examined by the roll: and see *Selden's* privilege of baronage, 1st part, c. 4.

supposeth

supposeth to be the case, will best appear by taking a short view of the publick transactions at and after his deposal to the time of his death.

Dugd. Sum. 136.

The Parliament, which had been called by *Edw. II.* and stood prorogued to the morrow of *Epiphany* in the 20th of his reign, met at *Westminster* \* at that time; and unanimously resolved, that the King was not of ability to govern; that he suffered himself to be led in all things by wicked counsels; that he had done what in him lay to ruin his kingdom and people; and that there appeared no hopes of his amendment.

For which reasons they resolved, that the Lord *Edward*, the King's eldest son, should immediately take upon him the government of the kingdom, and should be crowned King †.

I am not at present concerned to inquire, whether this charge was or was not well founded. But admitting that it was, the Parliament proceeded upon a principle, which, in the case of individuals, is perfectly understood and universally assented to: I mean the right of self-defence in cases of great and urgent necessity, and where no other remedy is at hand; a right, which the law of nature giveth, and no law of society hath taken away.

If this be true in the case of individuals, it will be equally so in the case of nations *under the like circumstances of necessity*: for all the rights and powers for defence and preservation belonging to society are nothing more than the natural rights and powers of individuals transferred to and centering in the body, for the preservation of the whole; and from the law of self-preservation, considered as extending to civil society, resulteth the well-known maxim, *salus populi suprema lex*.

I think the principles here laid down must be admitted, unless any one will choose to say, that individuals in a community are, in certain cases, under the protection of the primitive law of self-preservation, but communities composed of the same

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\* *Apologia Adæ de Orleton inter decem scriptores.* Col. 2765.

† The Parliament-roll is not now extant. It was laid before the Parliament in the 10th of *R. II.*; and probably was destroyed about that time, or at least before the end of that reign: so that for want of a better guide we must follow the history of the time. See the questions propounded to the judges in the 11th of *R. II.* and their answers cited below p. 395.

individuals are, in the like cases, excluded; or that when the enemy is at the gate, every single soldier may and ought to stand to his arms, but *the Garrison* must surrender at discretion.

The resolution of Parliament just mentioned was notified to the King, then a prisoner in *Kenilworth* castle, by a very solemn deputation from that body; when Sir *William Trussel*, in the name of the rest, and as procurator of the whole Parliament, addressed himself to the King in terms extremely full, strong, and explicit, which I shall not transcribe; importing that the whole Parliament renounced all allegiance to him, and thenceforward would consider him as a private person divested of the royal dignity.

Walsing.  
Ao. 1327.  
2o Ed. II.  
Ranulph.  
Citrifensis &  
Knighton  
Eodem Ao.

The young Prince, then about fourteen years of age, was advised to refuse the offer of the crown from the Parliament, unless his father would make an actual resignation of it to him; which, it is said, was soon afterwards done.

And the commencement of the new King's reign was fixed by Parliament to the 20th of *January*; and on the 24th his peace was proclaimed in *London*; as it was soon afterwards in all other parts of the kingdom by virtue of writs teste the 4 Rym. 243. 29th.

The writs ran thus;

"Rex vicecomit' N. salutem. Quia Dominus Edwardus,  
"nuper rex Angliæ, pater noster, de communi consilio & assensu  
"prælatorum, comitum, baronum & aliorum magnatum, necnon  
"communitatum totius regni prædicti, spontanea \* voluntate se  
"amovit a regimine dicti regni, volens & concedens, quod nos,  
"tanquam ipsius primogenitus & hæres, ipsius regni regimen &  
"gubernationem assumamus. Nosque ipsius patris nostri bene-  
"placito \* in hac parte de consilio & advisamento prælatorum,  
"comitum, baronum, magnatum, & communitatum prædictorum  
"annuentes, gubernacula suscepimus dicti regni, & fidelitates &  
"homagia ipsorum prælatorum & magnatum recepimus, ut est  
"moris.

\* The resignation, if ever he made any, undoubtedly was not matter of choice. The merits of the case will therefore turn upon another principle.

"Desider-

"*Defiderantes igitur pacem nostram pro quiete & tranquillitate populi nostri inuolubiliter obseruari tibi precipimus, quod statim visis presentibus per totam balluam tuam pacem nostram publice proclamari facias; universis & singulis ex parte nostra inhibenda, ne quis sub poenâ & periculo exheredationis & amissionis vitæ & membrorum pacem nostram violare præsumat.*"

"*Sed quid quilibet actiones & querelas suas absque violentiâ quacunque prosequantur secundum leges & consuetudines regni nostri. Nos enim parati sumus & semper erimus omnibus & singulis conquerentibus, tam diuitibus quam pauperibus, plenam justitiam exhibere. Teste rege &c."*

"*Per ipsum regem.*"

(See 2 Rym. 1.  
9 Rym. 1.  
15 Rym. 123.  
18 Rym. 2.)

This was in those days the usual method of notifying the accession of a new King: and I think stronger expressions cannot be conceived, importing that the regal character resided in the new King, and in him alone, than are made use of in this writ.

On the first of *February* the King was crowned; and two days afterwards he held his first Parliament, the same which deposed his father, and set the crown on his head. And at this Parliament, begun and ended in the life-time of *Edward II.* \*, all the statutes of the first of *Edward III.* now extant were made. Among others was that for confirming the banishment of the *Spencers* and indemnifying all persons who in the late troubles had taken up arms in behalf of the King against his father; which the reader will find in *Rastal's* statutes, and in all the editions anterior to that collection.

There are in Mr. *Rymer's* collection of publick acts between 30 and 40 instruments of various kinds during the interval between the deposal and death of *Edw. II.*, in which mention is made of him; and in those he beareth no stile approaching nearer to royalty than either the Lord *Edward* late King of *England* father of the King, or the Lord *Edward* late King of *England* our father, or barely the King's father. I will cite one of them.

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\* On the 24th of *August* in the 1st. of *Edw. III.* writs issued for calling a new Parliament, and we know that *Edw. II.* lived to the 21st of *September* in that year. *Engd. Sum.* 140. 1 *Prynne Brev. Parl.* 25.

It is a writ directed to the sheriff of Oxon, and it reciteth;  
 “ Cum, ut accepimus, *Willielmus de Aylmere coram dilecto & fi-* 4 Rym. 304.  
 “ *deli nostro Thoma de Berkele (quem assignavimus conservatorem*  
 “ *pacis nostræ in comitatu tuo & in Gloucestriâ) sit indictatus de*  
 “ *consensu & abetto ad depredandum castrum de Berkele, & ad*  
 “ *rapiendum dominum Edwardum de Caernarvon, nuper regem*  
 “ *Angliæ, patrem nostrum, & ad levandum populum nostrum de*  
 “ *guerra contra nos, & eâ occasione captus in prisonâ nostrâ*  
 “ *Oxonie sit detentus.*”—The writ then requireth the sheriff  
 to admit the prisoner to mainprise, if he could find sufficient  
 manucaptors body for body, for his appearance in the court of  
 King’s Bench on the octaves of St. Michael, “ *ad faciendum*  
 “ *& recipiendum quod curia nostra consideraverit in hac parte.*”

“ *Teste Rege 20 Aug.*”

A writ of *certiorari* of the same teste and return issued to  
 Sir *Thomas Berkly* for removing the indictment. But what  
 was the issue of this prosecution I know not: though I make  
 no doubt, that *Aylmer’s* offence was an attempt to deliver the  
 King’s father from prison, and to restore him to the royal dig-  
 nity; for many attempts of that kind were made about this  
 time, which probably hastened the death of the old King.

I fear I shall be thought to have taken some unnecessary  
 pains in proving, that *Edw. II.* after his deposition was confi-  
 dered and spoken of in all publick acts, as a person utterly  
 divested of the regal character; for in truth the persons then  
 in power, to be consistent with themselves, could not speak  
 otherwise of him. And if Mr. *Prynne*, or the nonjurors of our  
 time had been the only persons, who had made a question of it,  
 I should have spared myself the trouble I have now taken: but  
 the political mistakes of a writer of Lord Chief-Justice *Hale’s*  
 distinguished merit deserve great attention; especially when  
 the professed enemies of the present government affect to shel-  
 ter themselves under his name, as we know they have done,  
 with some degree of triumph,

The learned judge is of opinion, that the Parliament of the  
 4th of *Edward III.* considered the murder of *Edw. II.* as the  
 murder of him who was still a King, though deprived of the

B b

actual

*actual administration of his kingdom*; and that in that light they deemed it to be high treason. If they did really entertain this opinion, what opinion did they entertain of the King on the throne, or of themselves and the body of the nation? Did they think him an usurper, and themselves rebels, during the interval between the depofal and death of *Edward II.*? This would have been an heavy imputation upon them: and yet if *Edward II.* was, to the time of his death, still a King, intitled to their allegiance, the charge of usurpation and rebellion cannot be avoided.

His Lordship, as I have observed, groundeth his opinion on the record of the proceedings against the murderers of *Edw. II.*, and the Earl of *Kent*. But it cannot be said, that there is in this record any plain, exprefs declaration of the sense of the Parliament touching this matter. It therefore giveth one some concern, that, in a point of such moment, a writer of his Lordship's great candour and distinguished abilities should pronounce peremptorily touching the sense of that Parliament, without at least one explicit parliamentary declaration to warrant him in so doing; especially when the notion of *Edw. the 2d's* supporting the regal character, after his deposition, appeareth to be utterly repugnant to a series of facts and declarations, anterior to that Parliament, plain, full, and explicit, as words and actions can be.

I admit, that if that Parliament could not have proceeded in the manner they did upon any other principle than that of *Edw. the 2d's* sustaining the regal character to the time of his death, it might have been inferred from these records, that they did proceed on that principle. But, I hope, I have already shewn, that the judgment of high treason against the murderers of *Edw. II.* doth not necessarily presuppose the truth of that principle; because that judgment might be, and most probably was, founded on another.

His Lordship doth not seem to deny, that that judgment might in some measure be founded on the rule laid down by *Britton* and *Coke*, *That killing the King's father was treason*; but contendeth, that it was not grounded *simply* on that opinion: because he observeth, " That in the Parliament-roll of the  
 " 4th



“ 4th of *Edw. III.*, *Edw. II.* is stiled, at the time of his murder, *Seigneur Lige*, and sometimes *Rex*, as N. 6. the Lords make their protestation, that they are not to judge any but their Peers; yet they declare, that they gave judgment upon some who were not their Peers in respect of the greatness of their crimes, & *ce per encheson de murder de Seigneur Lige &c.* And in the arraignment of *Thomas Lord Berkly* for that offence, the words of the record are, *qualiter se velit acquietare de morte ipsius Domini Regis*; who pleaded, *quod ipse de morte ipsius Domini Regis in nullo est inde culpabilis*. And the verdict, as it was given in Parliament, and the record is, *quod prædictus Thomas in nullo est culpabilis de morte prædicti Domini Regis, patris Domini Regis nunc*. So that the record stiles him *Rex at the time of his death*.”

1 Hale 105.

I confess I do not see, that *Edw. II.* is in any part of this record stiled *Seigneur Lige*, or *Rex* AT THE TIME OF HIS DEATH; and it is on that supposition alone, that his Lordship's whole argument is built. It is true, he is stiled *King and Leige Lord* in a proceeding against his murderers; but this doth by no means imply, that he was considered as a *King at the time of the murder*. For in what manner is he stiled *King* in this record? Mr. *Prynne* hath given us the record at large in the case of *Sir Thomas Berkly*. But as his copy is incorrect, and as the proceeding was something singular, being a trial in Parliament by a jury of freeholders, I here insert a copy of the record examined by the Parliament-roll.

Plea for the Lords, 317.

“ *Placita coronæ tenta coram domino Edwardo rege tertio post conquestum, in pleno parlamento suo apud Westmonasterium, Die lunæ proximo post festum Sanctæ Catherinæ Virginis, Anno regni regis ejusdem quarto.* ”

Rot. Parl. 4 E. III. No. 16.

[Nov. 25.]

“ *Thomas de Berkele miles venit coram domino rege in pleno parlamento suo prædicto, & allocutus de hoc; quod cum dominus Edwardus nuper rex Angliæ, pater domini regis nunc, in custodiâ ipsius Thomæ, & cujusdam Johannis Mautravors nuper extitit liberatus ad salvo-custodiendum in castro ipsius Thomæ apud Berkele in comitatu Gloucestriæ, & in eodem castro in custodiâ ipsorum Thomæ & Johannis mûdratus ex-* ”

B b 2

“ titit

titit & interfectus, qualiter se velit de morte ipsius regis acquie-  
 tare? Dicit, quòd ipse nunquam fuit consentiens, auxilians,  
 seu procurans ad mortem suam, nec urquam scivit de morte suâ  
 usque in præsentì parlamento isto, & de hoc paratus est acquie-  
 tare se, prout curia regis consideraverit. Et super hoc quæsi-  
 tum est ab eo, ex quo ipse est dominus castri prædicti & idem  
 dominus rex in custodiâ ipsorum Thomæ & Johannis extitit  
 liberatus ad salvo-custodiendum, & ipsi custodiam ipsius regis  
 receperunt & acceptarunt, qualiter se excusare possit, quin de  
 morte ipsius regis respondere debeat? Et prædictus Thomas di-  
 cit, quòd verum est, quòd ipse est dominus castri prædicti, &  
 quòd ipse simul cum Johanne Mautravors custodiam ipsius re-  
 gis recepit ad salvo-custodiendum, ut prædictum est. Sed di-  
 cit, quòd eo tempore quo dicitur ipsum dominum regem esse mur-  
 dratum & interfectum, fuit ipse tali & tantâ infirmitate apud  
 Bradeley extra castrum prædictum detentus, quòd nihil ei cur-  
 rebat memoriæ. Et super hoc dictum est ei, quòd ex quo cog-  
 novit, quòd ipse simul cum dicto Johanne custodiam ipsius  
 domini regis obtinuit, ut prædictum est, & ipse custodes & mi-  
 nistros sub se posuit ad custodiam de eo faciendam, si per aliquam  
 infirmitatem se excusare possit, quin respondere debeat in hac  
 parte? Et prædictus Thomas dicit, quòd ipse posuit sub se  
 tales custodes & ministros in castro prædicto pro custodiâ faci-  
 endâ, in quibus ipse se confidebat, ut de seipso, qui custodiam ipsius  
 regis simul cum prædicto Johanne Mautravors inde habuerunt,  
 unde dicit quòd ipse de morte ipsius domini regis, auxilio, assensu,  
 seu procuratione mortis suæ in nullo est inde culpabilis. Et de  
 hoc de bono & malo ponit se super patriam. Ideo venerint inde  
 juratores coram domino rege in parlamento suo apud Westmo-  
 nasterium in octabis sancti Hillarii proxime futuri &c. Ad  
 quem diem venit prædictus Thomas coram domino rege in  
 pleno parlamento suo, ac similiter juratores, scil. Johannes  
 Darci, Johannes de Wisbam, Willielmus Trussel, Rogerus de  
 Swyneuerton, Constantius de Mortimer, Johannes de Sancto  
 Phileberto, Richardus de Rivers, Petrus Hussy, Johannes  
 de Dynton, Richardus de la Rivere, Robertus Debenbate &  
 Richardus de Corveyes, omnes milites, qui dicunt super sa-  
 cramentum

“ *cramentum suum, quòd prædictus Thomas de Berkele in nullo*  
 “ *est culpabilis de morte prædicti domini Edwardi regis, patris*  
 “ *domini regis nunc, nec de assensu, auxilio, seu procuratione mor-*  
 “ *tis ejusdem. Et dicunt quòd tempore mortis ejusdem domini*  
 “ *Edwardi regis, patris domini regis nunc, fuit ipse tali infirmi-*  
 “ *tate gravatus apud Bradeley extra castrum suum prædictum,*  
 “ *quòd de vitâ ejus desperabatur. Ideo idem Thomas inde qui-*  
 “ *etus. Et juratores quæsi, si idem Thomas unquam substraxit*  
 “ *se occasione prædictâ, dicunt, quòd non. Et quia idem Thomas*  
 “ *posuit custodes & ministros sub se, scil. Thomam de Gourney &*  
 “ *Willielmum de Ocle ad custodiam de ipso domino rege faciendam,*  
 “ *per quos ipse dominus rex extitit murdratus & interfectus, da-*  
 “ *tus est ei dies coram domino rege nunc in proximo parlamento*  
 “ *suo, de audiendo judicio suo &c. Et prædictus Thomas de*  
 “ *Berkele interim committitur Radulpho de Nevil seneschallo hos-*  
 “ *pitii domini regis &c.*”

I have already observed, that *Edw. II.*, in the interval between his deposition and death, was most commonly stiled, as he is in the beginning of this record, *dominus Edwardus nuper rex Angliæ, pater domini regis nunc*. But I would not be thought to infer from this record what may, I think, be reasonably inferred from those worded in the same manner in the lifetime of the King: for this being a proceeding after his death, he was with strict propriety stiled *nuper Rex*, whatever opinion the Parliament might entertain concerning him, or the proceedings against him. What I would observe is, that as the words *nuper rex* import no more than that he lately was King, and do by no means imply that *he continued so to his death*, it cannot be inferred from any thing in this record, that in the opinion of that Parliament he did continue to bear the regal character after his deposition. This, I say, cannot be inferred from the words *nuper rex*: and the words upon which his Lordship groundeth his opinion, *ipsius domini regis, prædicti domini regis, &c, &c*, have in this record a plain reference to the person named at the beginning under the stile of *nuper rex*.

It is well known, that in parliamentary proceedings of this kind, it is and ever was sufficient, that matters appear with proper light and certainty to a common understanding; with-

P. 384.

out that minute exactness which is required in criminal proceedings in *Westminster-hall*. In these cases the rule hath always been, *loquendum ut vulgus*: and in common speech when we speak of former Kings, we give them simply the titles they formerly bore, and no-body mistaketh our meaning. The legislature hath very frequently spoken of former Kings in the same stile. They did so about ten times in the case of *Edw. II.* in the act for confirming the banishment of the two *Spencers* before-mentioned; and yet whoever readeth the act with the least attention will see, that they considered him in no other light than as a person utterly deprived of the regal character: and in the stile \* of the petitions whereupon that act and others were grounded, he is called King after his deposition; and so are his father and grandfather, when they had been long in their graves †.

I hope I need not labour this point.

The judgment of high treason against the murderers of *Edw. II.* hath been already in part considered: but something farther remaineth to be said on that head. Against whom in the judgment of this Parliament was this treason committed? Against *Edward II.* or *Edward III.*? A satisfactory answer to these questions will be decisive in the point: for high treason being, as I have observed, an offence *contra ligeantia debitum*, if the Parliament considered the murder of *Edw. II.*, as a treason committed against his crown and dignity, they must be supposed to consider him as a person to whom allegiance was then due, or, in Lord *Hale's* words, as still a King, though deprived of the actual administration. On the other hand, if it was considered as a treason committed against the crown and dignity of *Edward III.*, the consequence will be, that in the judgment of that Parliament the allegiance of the subject was due to him in the life-time of his father; and then the murder of the father will fall under the same

4 Rym. 145.

\* "Fait a remembar, que le tierce jour de fevrier l'an de roy Edward, Fitz au Roy Edward, Fils au Roy Edward, Fils au Roy Henry &c."

Dugdale  
Sum.

† In the proceeding against *Mortimer* at this Parliament so little regard was paid to the forms observed in legal proceedings, that he, who had been frequently summoned to Parliament as a Baron, and had been then lately created Earl of *March* and by that title summoned to four successive Parliaments, is stiled through this whole record barely *Roger de Mortimer*.

rule as offences of the like kind against the blood-royal did at common-law; and as the offences I have already mentioned still do by virtue of the statute of treasons.

For let it be remembered, that in consideration of law the royal Majesty of the King is impaired by outrages of a treasonable kind done or attempted against the blood-royal. The rule laid down by *Bracton* before cited is founded on this principle; the cases put by *Britton* plainly arise out of it; and so do those of the same kind provided for by the statute of treasons. The principle is still true; only the statute limiteth and restraineth the operation of it to the few cases therein expressed; excluding all others, which the common-law brought under the same general rule.

Now whether the murder of *Edw. II.* was considered as a treason committed against his crown and dignity, or against the crown and dignity of his son will appear by taking a short view of the record of the proceeding against his murderers. The general title introductory to the whole charge runneth thus, "*Ces sont les treasons, felonies & malveisites faites a nostre seigneur le roi & a son poeple par Roger de Mortymer & autres de sa couyne.*" Then follow fifteen articles against *Mortimer*, by seven of which he is charged with *accroaching* to himself royal power in the several instances set forth in the articles; a species of treason well known in those days\*, and of which the prevailing party in times of faction and violence hath made a terrible use. By the other articles he is charged with many high crimes and misdemeanours, tending to the dishonour of the King and the oppression of the people.

Rot. Parl. 4 E.  
III. No. 1.

The article touching the murder is to this effect. "Whereas the father of our Lord the King was by an ordinance of the Peers of the land placed in *Kenelworth* castle there to remain at his ease, and to be served as became so great a Lord, the said *Roger*, by royal power to him accroached, took upon himself the custody of him, and caused him to be removed to the castle of *Berkly*; where by him, and

\* V. 1 *Hale* 80, 81, concerning this species of treason.

"by his procurement, he was falsely, traiterously, and feloniously murdered."

The record, after setting forth the articles, goeth on to this effect, "Wherefore our Lord the King doth charge the earls, barons, and other peers of the realm, that, forasmuch as these things touch him principally, and them, and all the people of the realm, they do unto the said Roger right and lawful judgment." And then followeth the judgment, "That for the said crimes, and principally for the murder of the Lord Edward, father of the King, the said Roger as a traitor and enemy of the King and kingdom be drawn and hanged."

Eod. Rot. No. 2. The like judgment was given against *Simon de Beresford*, as being an accomplice with *Mortimer* in all his said treasons, felonies, and misdeeds, that he as a traitor of the King and his realm be drawn and hanged.

No. 3, 4.  
P. 381. *John Maltravers*, *Bogo de Bayone*, and *John Deveral*, whose case I have already mentioned, had judgment of high treason for compassing the death of the Earl of *Kent*.

No. 5. *Gourney* and *Ocle*, who were supposed to be the actual murderers of *Edw. II.*, had the same judgment "*Pour le mort le roi Edward pere nostre seigneur le roi que ore est.*"

No. 6. The Lords having passed judgment against these men, who all, except *Mortimer*, were commoners, enter their protestation to the effect mentioned by *Hale* in the passage I have already cited.

P. 387. This is the substance of the whole record, as far as concerneth the murder of *Edw. II.*, except what relateth to the case of *Sir Thomas Berkly*, which I have already considered \*.

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\* The Parliament-roll of the 4th of *Edw. III.* is so defaced that the general title and one or two of the articles against *Mortimer* are not tolerably legible; and in some others there are considerable chasms. It was much defaced when *Sir Robert Cotton* compiled his abridgment of the Tower-records, and is probably grown worse since that time. But these defects may be easily supplied, since the proceeding is set forth at large in the Parliament-roll of the 28th of *Edw. III.* which remaineth still legible.

No. 8, 9, 10,  
11, 12.

For at that Parliament *Roger de Mortimer*, who was grandson and heir of him against whom the judgment was given in the 4th of the King, preferred his petition complaining that his grandfather was attainted without being brought to his answer AGAINST THE TENOR OF THE GREAT CHARTER, and praying that the judgment of attainder might be reversed, and himself restored in blood, which was accordingly done: and he was summoned to Parliament

From this record, I think, it is evident, that this murder was considered as a treason committed against the King then on the throne, and him alone. For that species of treason which they called *accroaching royal power*, which maketh a very considerable part of the charge, could never, as I apprehend, in the nature of things be considered in any other light than as an offence against the crown and dignity of him who, for the time being, was actually invested with the regal power: and it is remarkable, that this species of treason is expressly charged on *Mortimer* in the article touching the murder, as one step taken by him preparatory to that fact.

Besides, the articles against *Mortimer* and his accomplices, of which that touching the murder is one, and upon which the judgment was principally founded, charge facts upon them, committed, a few of them before, the much greater part after the death of *Edw. II. but all after his deposition*: and yet the whole charge is introduced with this general title, "*These are the treasons done to our Lord the King*;" plainly importing, that those treasons, none excepted, were considered in one and the same view, namely, as done against the King then on the throne, and him alone: and the judgment against *Mortimer* and *Beresford*, that they for those treasons, as traitors and enemies of the King and kingdom, be drawn and hanged, import the same. Nor is there a single word in the whole record, declaring, or so much as giving the most distant hint, that any of the treasons therein mentioned were committed in breach of the allegiance due to *Edw. II.*

It is true, as his Lordship observeth, he is stiled, in the Lords' protestation, *seigneur leige*, and, in the judgment against *Gourney* and *Ocle*, *le roy Edward*; but I have already considered, and, I hope, removed the objection grounded on that manner of expression.

I have nothing to add with regard to the proceedings against the murderers of *Edw. II.* But a difficulty hath been raised, which may be thought to deserve some notice; and since my subject leadeth me to it, I will mention it.

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Parliament in the following year by the stile and title of Earl of *March*; his father who died before the reversal never having been summoned. Dugdale and Cotton.

I make use of the roll of the 28th compared with that of the 4th where it is legible.

In

Cotton  
23 Rich. II.

In the 21st of *Rich. II.*, the act of the first of *Edw. III.* for confirming the banishment of the *Spencers*, already mentioned, was repealed: and one reason given on the roll is, "That the act was made by *Edw. III.* at such time as his father *Edw. II.* was living, *being very King and in prison* so that he "could not resist the same."

1 Hen. IV.  
c. 3.

Some writers have thought it sufficient to say, that the whole Parliament of the 21st of *Richard II.*, and every thing done in it, is annulled by the 1st of *Henry IV.* But this answer will not remove the difficulty, if there be any in the case: for the objection is not founded on any legislative or judicial act, (those acts are undoubtedly repealed,) but barely on the *opinion* of that Parliament; and the sense of Parliament, it is said, touching any past transaction, will be of equal weight, whether it's legislative or judicial acts continue in force or not.

This is admitted. But it must likewise be admitted, that if the opinion of a single Parliament, unsupported by fact or principle, is to turn the scale, every resolution of the same Parliament, considered as matter of *mere opinion*, will be of equal weight. If this be granted me, I will, as shortly as I can, state a resolution of this Parliament upon some very constitutional points; and then leave it to the reader's judgment, how far it's bare opinion is to be regarded.

Rastal's Stat.  
10 Rich. II.

In the 10th year of this King a commission of a very extraordinary nature issued under the great seal, and had the confirmation of Parliament. By it the Duke of *Gloucester*, and some others by name, and the chancellor, treasurer, and keeper of the privy-seal are constituted the King's great and standing council for one year, for the purposes mentioned in the commission. The commissioners' powers were very large, and were thought to be derogatory to the royal prerogative: and therefore the King and his ministers, soon after the dissolution of the Parliament, entered into measures for defeating this commission. One expedient was to take the opinion of the judges upon the whole proceeding; a refuge constantly open to a corrupt administration, though, be it spoken to the honour of the profession,



profession, not always a sure one; even while the judges' commissions were determinable at the pleasure of the crown.

To this end, the judges were summoned to attend the King at *Nottingham*; and the two chief-justices, and three puisnes did attend, and gave answers to ten questions which were propounded to them in the King's presence. Some of their answers were to this effect \*, That those who procured the statute and commission just mentioned were to be punished with death, except the King would pardon them; as were also those who moved the King to consent to the statute: and that as well the person who moved in the last Parliament, that the statute whereby *Edward II.* was deposed should be laid before the Parliament, as he who in pursuance of that motion carried the same into Parliament, are *traitors and criminals to be punished with death.*

There were two other questions, which, with the answers, I think worth transcribing.

"SIXTH question, Whether after in a parliament assembled the affairs of the kingdom, and the cause of calling that Parliament are by the King's command declared, and certain articles limited by the King, upon which the Lords and Commons in that Parliament ought to proceed, if yet the said Lords and Commons will proceed altogether upon other articles and affairs, and not at all upon those limited and proposed to them by the King, until the King shall have first answered them upon the articles and matters so by them expressed, *although the King's command be to the contrary*; Whether in such case the King ought not to have the governance of the Parliament, and effectually over-rule them, so as that they ought to proceed first on the matters proposed by the King; or whether, on the contrary, the Lords and Commons ought first to have the King's answer upon their proposals, before they proceed farther."

To which question they answered unanimously, "That the King in that behalf hath the governance, and may

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\* See *Rosier's Stat.* 21 *Rich. II.* 1 *State Trials*, 1 &c. *Knighton* inter decem script. Col. 2694.

"appoint

"appoint what shall be first handled, and so gradually what  
 "next, in all matters to be treated of in Parliament, *even to the*  
*"end of the Parliament*; and if any persons shall act contrary  
 "to the King's pleasure made known therein, *they are to be*  
*"punished as traitors."*

"EIGHTH question, Since the King can, whenever he  
 "pleaseth, remove any of his judges and officers, and justify or  
 "punish them for their offences; whether the Lords and Com-  
 "mons can without the will of the King impeach in Parlia-  
 "ment any of the said judges or officers for any of their of-  
 "fences."

To which they unanimously answered, "That they cannot,  
 "and if any one should so do, *he is to be punished as a traitor.*"\*

22 Rich. II.

Rafal's stat.  
as Rich. II.

In this manner did these judges prostitute their *sacred* cha-  
 racter! But a prostitution so gross could not long escape a  
 publick censure: and at the next Parliament a censure suffi-  
 ciently severe, and not warranted by any known rule of law, did  
 pass upon them. *Their own measure was meted out to them.* †  
 But in the 21st of the King, those questions, with the judges'  
 answers, having been read over in full parliament, "It was  
 "demanded of all the estates of the Parliament, how they  
 "thought of the answers aforesaid: and they said, that they  
 "thought the said justices made and gave their answers *as good*  
*"and lawful liege people of the King ought to do."*

A Parliament that could solemnly adopt principles, so con-  
 trary to the whole tenor of the statute of treasons, anti-consti-  
 tutional in every point of view, subversive of the undoubted  
 rights of Parliament, and of all freedom of debate in either  
 House, such a Parliament must, unless under an actual force,  
 which most probably was the case, be the willing tools of de-  
 spotick power: and in either case it's bare opinion deserveth  
 no manner of regard.

I will now consider some other passages in the history of the  
 Pleas of the Crown, of much the same tendency with that I

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\* These questions and answers, being copied from a modern translation, dif-  
 fer in stile from *Rafal* and the older editions of the statutes, but in sense and  
 substance they agree with all of them.

† See 1st State Trials, 1 &c. the proceedings against Chief-Justice *Trefilian*  
 and others.

have already examined. The learned author asserteth with great truth, that a King *de facto*, in the full and sole possession of the sovereignty, is such a King, against whom high treason may be committed within the statute of treasons; and addeth, that treasons against a King *de facto*, not being attempts in aid of the rightful heir, may be punished in the time of a King *de jure*; and that those who have assisted the usurper, though in the actual possession of the Crown, have on the regrest of the Crown to the right heir suffered as traitors.

1 Hale 60, 61,  
201 to 203.

I fear it will avail very little towards the settling any point of law or rule of right, to inquire in what manner princes, on such revolutions as those alluded to in these passages by the learned author, have treated either their friends or their enemies. It is not to be imagined, that they will consider the former as traitors for acts of hostility done or attempted in aid of themselves. I verily believe no prince in his right senses ever did. His lordship doth indeed in the passages just cited mention the case of Sir *Ralph Grey*; and supposeth, that he was punished in the time of *Edw. IV.* for treasons committed against *Henry VI.* in aid of *Edward* \*. But, I doubt, that case will not warrant any such supposition.

2 Hale 61. 203.

Sir *Ralph* was taken in actual rebellion against *Edw. IV.* some years after he had been in full possession of the Crown; and was beheaded for that treason, and for that alone; as many more were at the same time. He was likewise degraded: and the book saith, that the reason of his punishment "*en tiel man-  
ner*" (by degradation, as I understand the book,) was "*pur  
cause de son perjury & doublenes que il avoit fait al Roy Hen-  
VI. jades Roy &c. [ & auxi al Roy Edward le quart que ors  
est. ]*" † He had, it seems, acted a part truly infamous, had betrayed both sides, had broken his faith to both Kings: and for this duplicity he was, by a peculiar brand of infamy, distinguished from those who suffered with him for the same treason. All were beheaded, he alone was first degraded.

4 Ed. IV. 20.

\* (See the conclusion of the editor's preface to the second edition.)

† The words between the hooks the learned judge hath omitted. (See the end of the advertisement which follows the author's preface.)

With

With regard to the measures which have been observed towards the enemies of a new government, after a long struggle and much blood-shed, our history furnisheth instances more than enough, of a most unwarrantable revenge taken by the prevailing faction. The acts of attainder passed against the chiefs of the *Lancastrian* party in the first year of *Edw. IV.*, which the learned judge alludeth to in the places last cited, were of that kind: to be accounted for only by the heat and violence of the times; never to be drawn into precedent.

For *Henry VI.* had been in full possession of the Crown almost 40 years by lineal descent, and under a parliamentary settlement; in which the whole nation had acquiesced for 60 years. The fortune of war did at length decisively turn the scale in favour of *Edward* at the battle of *Towton-Field*; but with the loss of near 40000 *English* subjects, who fell on that day. And at such a juncture, to what lengths cannot the sweets of revenge, the joys of conquest, the prospect of rich plunder in a plenty of confiscations, with a misgiving heart still dreading the final issue of things,—to what lengths of violence cannot these incitements carry the vindictive, the ravenous, the timid, blustering mortals, who upon such revolutions either take the lead, or join in the cry! At seasons such as these, the still voice of law and reason is seldom heard.

I fear it was little attended to in the case of any of the attainders passed on either side during the unnatural war between the two *Roses*. Nor ought any of those attainders to be considered as cases from which the principles of law can be deduced. For, as his lordship elsewhere with a candour habitual to him observeth, “Parliaments have been always obsequious enough to the victor; and ready to pass attainders for *his safety and their own.*”

1 Hale 274.

1 Hale 61.

His lordship admitteth, that a temporary allegiance was due to *Henry VI.* as being King *de facto*. If this be true, as it undoubtedly is, with what colour of law could those who paid him that allegiance before the accession of *Edw. IV.* be considered as traitors? For call it a temporary allegiance, or by what other epithet of diminution you please, still it was due to him

him *while in full possession of the Crown* : and consequently those who paid him that due allegiance could not, with any sort of propriety, be considered as traitors for doing so.

The 11th of *Henry VII*, though subsequent to these transactions, is full in point. For let it be remembered, that though the enacting part of this excellent law can respect only future cases, the preamble, which his lordship doth not cite at large, is declaratory of the common-law ; and consequently will enable us to judge of the legality of past transactions. It reciteth to this effect, “ That the subjects of *England* are bound by the “ duty of their allegiance to serve their prince and sovereign “ lord *for the time being* in defence of him and his realm against “ every rebellion, power, and might raised against him ; and “ that whatsoever may happen in the fortune of war against the “ mind and will of the prince, *as in this land some time past it “ hath been seen*, it is not reasonable, but against all laws, reason, and good conscience, that such subjects attending upon “ such service should suffer for doing their true duty and service “ of allegiance.” It then enacteth, That no person attending upon the King for the time being in his wars shall for such service be convict or attain of treason or other offence by act of parliament, or otherwise by any process of law.

11 Hen. VII.  
c. 1.

1 Hale 272—  
274

Here is a clear and full parliamentary declaration, that by the antient law and constitution of *England*, founded on principles of reason, equity, and good conscience, the allegiance of the subject is due to the King for the time being, and to him alone. This putteth the duty of the subject upon a rational and safe bottom. He knoweth, that protection and allegiance are reciprocal duties. He hopeth for protection from the Crown, and he payeth his allegiance to it in the person of him whom he seeth in full and peaceable possession of it : he entereth not into the question of title, he hath neither leisure nor abilities, nor is he at liberty to enter into that question : but he seeth the fountain, from whence the blessings of government, liberty, peace, and plenty flow to him ; and there he payeth his allegiance. And this excellent law hath secured him against all after-reckonings on that account.

It

; Hale 104.

It being admitted, that allegiance is due to a King *de facto* in the full and sole possession of the Crown, it will follow, that a person absolutely out of possession, but claiming title, is not to be considered as a King within the statute of treasons ; which the learned judge supposeth to have been the case of the house of York during the reigns of the three *Henrys*.

I would ask therefore, At what point of time can it be said, upon any known principle of law, that the bond of allegiance due to *Hen. VI.* for instance ceased? When did he first become a mere disturber, and his adherents traitors and rebels? It will be impossible to maintain, that they became so the moment *Edward* marched into *England* to revenge the death of his father, who fell at the battle of *Wakefield* on the 30th of *December* 1460. The learned judge doth not contend, that they did : and I freely acknowledge it would be high presumption in me to attempt to determine with precision, from any known rule of law, at what point of time they did become so.

It is very true, that *Edward's* first Parliament made not the least difficulty of fixing the commencement of his reign to the 4th of *March* 1461, (the year considered as commencing the first of *January*) ; about which time, the gates of *London* having been opened to him, his own party, supported by his army, proclaimed him there : and his lordship, in conformity to the judgment of that Parliament, fixeth the commencement of *Edward's* reign to the same day ; and from that day pronounceth *Henry VI.* a mere disturber, not so much as a King *de facto*.

Dugdale.

But surely a military recognition of *Edward's* title, *flagrante bello*, for it was nothing more, and the triumph of one week at most that immediately followed it, cannot with any sort of propriety be said to have put him into the real, actual possession of the sovereignty. His victory at *Towton-Field* a few weeks afterwards did indeed put an end to the competition : and in consequence of that writs issued on the 23d of *May* returnable the 6th of *July* for calling a Parliament ; which by reason of some remaining troubles in the kingdom never met. On the 29th of *June* he was crowned, and upon the 4th of *November* he

he held his first Parliament, for which the writs bore *teste* the 26th of *July*.

Dugdale.

This Parliament, as I before observed, fixed the commencement of his reign to the 4th of *March* 1461. But, I doubt, the incitements before mentioned had too great a share in this measure: for by this retrospect to the 4th of *March*, they gave themselves some colour, and but a colour of law, for attainting many of the chiefs of the Lancastrian party for the share they had in the battle of *Towton-field* on the twenty-ninth of that month, and afterwards in some smaller actions, before matters were thoroughly settled. Here, I say, the prevailing party assumed the colour of a legal procedure. But they had not even the colour of law, for attainting those of the Lancastrians who bore a part in the actions at *Wakefield*, and at other places; all antecedent to the time at which *themselves* had fixed the commencement of *Edward's* reign, and the period of *Henry's*: and yet acts for that purpose did pass at this Parliament; though the faction of *York* had affected to govern in the name of *Henry* then actually their prisoner from the middle of *July* 1460 to the middle of *February* following, if not longer; as appeareth by many publick acts in *Rymer's* collection.

Cotton.  
1 Ed. IV.  
No. 20, 24.

Ibid. No. 17,  
19, 25.

11 Rym. 458,  
to 471.

One of them is too remarkable to be lightly passed over. It is a commission from *Henry* himself to his competitor, *Teste* so late as the 12th of *February*, for raising forces in *Bristol* and the neighbouring counties, for subduing, chastising, and bringing to justice certain rebels and traitors then in arms against the King; meaning the Queen, the Prince, and other chiefs of the Lancastrian party then at the head of a formidable army, in defence of the King's person and government \*.

\* "Rex præcavissimo consanguineo nostro Edwardo duci Eborum, salutem.  
"Sicatis quod quidam subditorum nostrorum qui veri ligei nostri esse debent & tenentur,  
"diabolica fraude seducti, in numero non modico modo guerino ariantur—se propriâ temeritate & audaciâ congregârunt,—& de tempore in tempus alios quoscumque, ad statum  
"nostrum & regni nostri politicum regimen subvertendum, sibi congregans & congregare intendant,  
"Nos eorum temeritati, præsumptioni & audaciæ obviare volentes, ac de mobilitate, strenuitate, & providâ circumspectione vestris, plenius confidentes,  
"Assignavimus vos, ac vobis plenam committimus potestatem, ad advocandum vobis  
"omnes & singulos ligeos nostros villæ Bristolie—ad proficiscendum vobiscum contra præ-  
"fatos præsumptores atque rebelles nostros—ad eorum præsumptionem, temeritatem & audaciam reprimendum—& si res exigerit, tanquam hostes & rebelles nostros procedendum,  
"et eosdem expugnandum.

What contradictions cannot the lust of power reconcile!  
To what dirty expedients cannot ambition sometimes stoop!

The cases cited by the learned judge do not in the least shake the principle already advanced, that the throne being full, any person out of possession, but claiming title, be his pretensions what you please, is no King within the statute of treasons.

Kel. 15.

I am aware of the judgment of the court of King's Bench in the case of Sir Henry Vane, "That King Charles the second, though kept out of the exercise of the kingly office, yet was still a King both *DE FACTO* and *de jure*: and that "all acts done to the keeping him out were high treason."

Sir Henry Vane's was a very singular case, and the transactions in which he bore a part happened in a conjuncture of affairs which never did exist before, and, I hope, never will again; an usurpation founded in the dissolution of the antient legal government, and the total subversion of the constitution.

I will therefore say nothing to the merits of the question more than that the rule, laid down by the court, involved in the guilt of treason every man in the kingdom who had acted in a publick station under a government possessed *in fact* for twelve years together of sovereign power; but under various forms at different times, as the enthusiasm of the herd or the ambition of their leaders dictated \*.

But this resolution hath not in the least shaken the principle I contend for: it doth in reality suppose the truth of it; for if Charles the second was King *DE FACTO* from the death of his

"*Damus etiam universis & singulis legibus & subditis nostris—firmiter in mandatis, quod vobis in executione premissorum intendentes sint—aliquibus mandatis, commissionibus seu proclamationibus perante factis non obstantibus.*"

"*Teste rege apud Westmonasterium duodecimo die Februarii.*"

"*Per concilium.*"

2 St. Tri. 159.

\* Lord Chief-Justice Hale, when of high rank at the bar, took the engagement, "To be true and faithful to the commonwealth of England without a King or House of Lords." This, in the sense of those who imposed it, was plainly an engagement for abolishing kingly government, at least for supporting the abolition of it: and with regard to those who took it, it might, upon the principles of Sir Henry Vane's case, have been easily improved into an overt-act of treason against King Charles II.

x

father,



father, every thing done from that time in prejudice to his right was undoubtedly high treason.

The only difficulty is, What did the court mean by a King *de facto*? They could not mean, what every soul before themselves understood, a King in the actual and full exercise of the regal power. They meant, I presume, as his Lordship upon another occasion is pleased to express himself, one *QUASI in possession* of the crown; since, during the usurpation, no other person did claim to act under the regal title. 1 Hale 104.

The distinction between *de jure* and *de facto* Kings was taken up by the house of York to serve the purposes of ambition and revenge. By the former, they meant those who are presumed to have succeeded to the crown in a regular course of descent. By the latter, those who have not had that claim to it. The former were in their estimation the only rightful Kings. The latter, not excepting such as have claimed under a parliamentary settlement, no better than fortunate usurpers.

This doctrine perfectly suited the views of that faction. For the crown having been entailed by act of parliament on Henry IV. and his issue, the house of York saw itself totally excluded; unless it's pretensions could be supported by a title *PARAMOUNT to the power of Parliament*. Proximity in blood was it's only refuge, and to that the partizans of that house resorted: and in so doing they brought upon themselves, in my opinion, the whole guilt of that deluge of blood, which was afterwards spilt in the unnatural war between the two houses. 7 H. IV. c. 2.

It is not to be wondered at, that men whose ambition suggested to them the hope of over-turning an establishment, to which themselves, their ancestors, and the whole nation had submitted for more than half a century, should endeavour to convince mankind of the rectitude of their intentions and the justice of their claim. Nor is it at all surprizing, that their followers, *in the heat of the times*, should suffer themselves to be easily convinced; for in the ferment of parties, *leaders never blush, and the herd of the party seldom think*. But that persons who are placed at an happy distance from those disastrous times should in cool blood revive and adopt a doctrine, which

hath once laid their country waste, is not so easily accounted for.

But since this hath been done by learned men, among whom Lord Chief-Justice *Hale's* name must be mentioned with all just regard, I will endeavour to point out what I take to have been the radical mistake, which led them into a train of specious, but false reasoning upon this subject.

They seem not to have sufficiently attended to the nature and ends of civil power, whereof the regal dignity is a principal branch. They seem to have considered the crown and royal dignity merely as a descendable PROPERTY; as an estate or interest vested in the possessor for the emolument and grandeur of himself and heirs, in a regular invariable course of descent. And therefore, in questions touching the succession, they constantly resort to the same narrow rules and maxims of law and justice, by which questions of mere property, the title to a pigstye or a laystall, are governed; and thence conclude, that the legislature itself cannot, without manifest injustice, interrupt the antient, legal, established order of succession. It cannot, say they, without injustice, give to one branch of the royal family, what by right of blood belongeth to another.

Thus they argue: and if I could conceive of the crown, as of an inheritance of *mere property*, I should be tempted to argue in the same manner. But had they considered the crown and royal dignity, as a descendable OFFICE, AS A TRUST for millions, and extending it's influence to generations yet unborn; had they considered it in that light, they would soon have discovered the principle upon which the right of the legislature to interpose in cases of necessity is manifestly founded: and that is the SALUS POPULI, already mentioned upon a like occasion.

P. 382.

There is, and for many ages past hath been, a certain order of hereditary succession established among us: but it was for the sake of the whole, and to avoid the many inconveniences to which an uncertain succession is subject, that this order of hereditary succession ever took place; for no-body can say, that this or any other particular mode of government  
is

is founded in natural right. Nature discovered the necessity of civil government, but the several modes of it are either matters of choice or resulting from mere necessity or accident.

Hereditary succession in monarchical states is nothing more, than an expedient in government founded in wisdom and tending to publick utility: and consequently, whenever the safety of the whole requireth it, this expedient, like all rules of merely positive institution, must be subject to the controul of the supreme power in every state. Otherwise a nation will, in numberless cases which might be mentioned, find itself under a fatal necessity of sinking into ruin, inevitable and irretrievable: but certainly no nation was ever doomed to submit to the greatest of all evils, out of pure deference to a prudential expedient. This is too absurd to be conceived.

Let me add, that in the Parliamentary settlement already mentioned and in those I shall mention, (the powers delegated to *Hen. VIII.* only excepted,) the legislature hath proceeded upon a full conviction of the utility of this expedient: for when it hath, upon emergent occasions, excluded one branch of the royal family claiming by descent, it hath constantly established another in a course of hereditary succession. Title by descent was always esteemed by the legislature a wise expedient in government: but, in cases of necessity, it was never thought to confer an indefeasible right; because that would have been, *to defeat the end for the sake of the means.*

I have said, that those who have revived the doctrine upon which the house of *York* founded it's claim are constantly resorting to the same narrow rules by which questions of mere property are governed. I doubt I was a little too hasty in that observation: for, in the case of the Crown, they exclude one rule, which entereth into all questions of mere property, and is evidently founded in publick utility; I mean that whereby a right is acquired, or, which in the issue of things will amount to the same, the remedy is barred, by possession, acquiescence, and effluxion of time. The principle on which this rule is founded is plainly this; the publick good must always be preferred to the interest of individuals, and the publick good

evidently requireth, that property should not lie open to perpetual litigation.

Hale's History  
of the common  
law, 78.

This they will not deny in the case of private rights: but in the case of the Crown, they say the remedy of the rightful heir is not barred even by possession and acquiescence for many ages or descents. Give me leave to ask, What is this remedy? What hath it been in all ages and nations? Nothing less than the calamities of an intestine war; a remedy infinitely worse than the disease.

P. 382, 404.

It is admitted, that the remedy by civil suit is barred by possession and effluxion of time, and that publick utility requireth it should be so. And can it be imagined, that the most dreadful of all evils is the only remedy that is never to be barred? The rule I have already pointed to, *salus populi*, furnisheth a clear and ready answer.

P. 382.

I have nothing at present to add upon the foot of reason and publick utility, except it be to refer the reader to what hath been already offered in a similar case touching the right of self-defence, grounded on the primitive law of self-preservation. One clue will in both cases lead him very safely through all the difficulties, which the enthusiasm of party hath thrown in his way.

I will now consider the question upon the foot of historical evidence, and the principles of our constitution.

I do not intend to enter minutely into the history of the succession. That part hath been undertaken by others, and well executed. I shall confine myself to a few acts of Parliament.

28 H.VIII. c. 7.

I have already taken notice of the entail in favour of *Henry* the fourth and his issue; that in favour of *Henry* the seventh and his issue will be barely mentioned. I proceed to the time of *Henry VIII.* The statute of the 28th of that King, passed after his marriage with the lady *Jane Seymour*, after declaring the King's marriage with Queen *Katherine* void, and his marriage with *Anna Boleyn* likewise void, and the issue of both marriages illegitimate, limiteth the Crown to the sons of the King and Queen successively and the heirs of their bodies, remainder to the King's sons by any future wife in like manner, remainder

mainder to the daughters of the King and Queen successively and to the heirs of their bodies.

And after reciting, that if the King should die without lawful issue, no provision having been made in his life-time touching the succession, the realm in that case would be destitute of a lawful governour, "or else perchance *incumbered with such a* See the act.  
*person that would covet to aspire to the same; whom the subjects*  
*of this realm shall not find in their hearts to love, dread and*  
*obediently serve, as their Sovereign Lord\*,"* it goeth on to impower the King, in default of issue of his body, by letters patent or by last will, to limit the Crown to such person or persons in possession or remainder, and according to such estate, and after such manner, form, fashion, order, and condition, as he shall judge expedient.

It farther enacteth, that the persons so to be appointed shall enjoy the Crown subject to the limitations and conditions, in like manner "as if they had been *lawful heirs to the same,* or as See the act.  
 "if the Crown had been given and limited to them plainly and  
 "particularly by special names and sufficient terms, *by full and*  
*immediate authority of the High Court of Parliament.*

The 35th of the King, which is strongly enforced by the first of *Edward VI.*, reciting the last act, enacteth and declareth, that in default of lawful issue male *or female* of the King and Prince *Edward*, the Crown shall be and remain to the Princess *Mary* the King's daughter and the heirs of her body, upon such conditions as the King shall appoint by letters patent or last 35 H. VIII. c. 1.  
1 Ed. VI. c. 12.  
f. 9.

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\* This seemeth to be pointed at *James V. of Scotland*, who was at this time the next in succession upon the failure of the King's issue: not barely as being descended from the union of the two roses, but under a parliamentary entail in favour of *Hen. VII.* and the heirs of his body, made before that union took place; I mean before the King's marriage with the Princess *Elizabeth*; and consequently to the exclusion of her and the whole house of *York*.

But notwithstanding the near relation the house of *Stuart* stood in to the crown of *England*, *Scotland* was, during all King *Henry's* reign, the same detested enemy it had been for ages past: and a national prejudice operated in both kingdoms as strongly as ever. But that prejudice was happily, in great measure, worn out by time and a change of circumstances before the accession of our *James I.*; for upon the murder of his father, and the expulsion of his mother which soon followed, *French* counsels no longer prevailed in *Scotland*. Queen *Elizabeth* took the Infant-King and the reformers, who were the governing party and had the popular interest, under her protection; and the King, on his part, preserved at least the appearance of strict amity with her to the time of her death.

Rot. Parl.  
1 H. VII.  
See Bacon's  
H VII. an account of this matter.

As. 1567.

## DISCOURSE IV.

will, remainder to the Lady *Elizabeth* in like manner: and if they shall both fail in performing the conditions, or die without issue, the King is again impowered to limit the succession, as by the last act.

The legislature in these acts evidently proceeded upon a full conviction of the truth and utility of both the principles already mentioned, namely, that, no act of the legislature intervening, the Crown and royal dignity ought to descend from ancestor to heir in a certain established course of descent; but that this course of descent is subject to the controul of the legislature.

The former act declareth the Princesses *Mary* and *Elizabeth* illegitimate. The latter, upon a *supposition of their illegitimacy*, postponeth them even to all the lawful issue *female* of the King; and yet, in default of lawful issue of the King and Prince, it limiteth the Crown to them successively and the heirs of their respective bodies, in preference to all the other issue of *Henry* the seventh.

It cannot be denied, that the legitimacy of each of the Princesses was liable to some dispute. I think it impossible to support the legitimacy of both; though some writers from a zeal for the lineal succession have attempted it.

1 Mar. 6. 11. 2.  
c. 1.

Queen *Mary* was advised to get all the acts which stood in the way of her legitimacy repealed, as far as concerned *herself*; and the marriage of her father and mother declared valid, the sentence of divorce a nullity, and herself the legitimate issue of the King. But *Elizabeth* took a wiser course. She had full possession and a clear title under a Parliamentary settlement; and wisely resting on that, she suffered all altercation about the marriage of her father and mother, and the divorce grounded on a supposed pre-contract on her mother's part, to sink into perpetual oblivion.

1 Eliz. c. 3.

I think I am warranted, even by the act for recognizing her title, in saying, that she *rested on her Parliamentary title*: for, the peculiar circumstances of her case considered, a bare recognition, in general terms, of her right and descent from the *blood-royal*, unless the act had been more explicit, amounted, in my opinion, to no more than a ceremonious, but cold compliment to the Throne. It is true, the act doth declare her to be as  
fully

fully intitled as her father or brother. This may be so, since in the judgment of Parliament she had as *good*, though possibly not the *same* title they had. It goeth on and declareth her as fully intitled as her sister. She certainly was. But how doth that matter stand upon the foot of this act? The Queen is declared to be as fully intitled as her sister was at any time *since the statute of the 35th year of King Henry VIII.*, the act of settlement already cited. This declaration, so guarded and limited, seemeth strongly to imply, either that in the judgment of Parliament Queen *Mary* had no title antecedently to that act, or that, *Elizabeth* having no other, it was thought but decent to put the sister's upon an equal foot, as former Parliaments had done.

These things, together with the care taken to corroborate the act of settlement by a fresh confirmation of it, though the statute of *Edward VI.* before cited had strongly enforced it, P. 407. and an express repeal and abrogation "of all judgments and See the Act, "decrees by whatsoever power or authority given, and of every "clause, matter, or thing in any act or acts of Parliament repugnant to it," these things, I say, shew, that, whatever other title the Queen might be presumed to have, her title under the act of settlement had plainly the preference: and in fact, upon the first notice of her sister's death she was, by order of the House of Peers then sitting, proclaimed true and lawful heir to the Crown, according to the act of succession of the 35th year of *Henry VIII.* Can't 1.

The act for recognizing the title of her successor, penned : Jan. I. c. 2. in a strain of adulation suited to his taste, after mentioning the happy union of the houses of *York* and *Lancaster*, carrieth his pedigree back to *Elizabeth* the eldest daughter of *Edward IV.*, wife of *Henry VII.*; and is totally silent with regard to the entail on *Henry VII.* and his issue, by which, as I before observed, *Elizabeth* herself and the whole house of *York* were P. 403. excluded. But it is observable, that the tender of perpetual loyalty, faith and obedience, which the Parliament in terms of deep humility, "even upon the Knees of their hearts," makes See the Act. to him, is carried no farther than to his own person and his royal progeny and posterity for ever; in other words of less sound

found but equal import, *the heirs of his body*. This is very consistent with the entail on *Henry VII.* and his issue; and taketh in the whole extent of the King's title as founded on that entail: but seemeth to be far short of a title derived either from the house of *York* or *Lancaster*, or from the union of both.

The powers delegated to *Henry VIII.* by the statutes I have cited favour, it must be confessed, very strongly of *the temper of the times*. But still they imply a full conviction of the truth of the principles I have laid down. For the legislature, in order to give to the King's nomination the utmost stability the constitution will admit of, declareth, that the King's nominees shall hold and enjoy in like manner as if they had been *lawful heirs to the Crown*; "or as if the Crown had been given and " limited to them by name *by the full and immediate authority of " Parliament."*

The law of *England* knoweth of no title to the Crown, except right of blood, or the designation of Parliament. These titles are well known: and accordingly these acts give to the King's nominees the strength and security of both. Let me add, that the full and immediate authority of the legislature in the matter of the succession must have been presupposed as a matter past all dispute; otherwise a delegation of that authority would have been no better than an idle, vain and ineffectual parade; an insult upon common sense, and an affront to the King himself.

The principles I have endeavoured to collect by *implication and necessary supposal* from the acts already cited are plainly and expressly established by the statute of the 13th of Queen Elizabeth; which enacteth, among other things, " That if any " person, during the Queen's life, shall affirm or maintain, " that *the common law of the realm*, NOT ALTERED BY PARLIAMENT, ought not to direct the right of the Crown of " *England*, or that the Queen with the authority of Parliament " is not able to make laws of sufficient force to limit and bind " the Crown, and the descent, limitation, inheritance, and government thereof, every person so affirming or maintaining " shall be judged a traitor, and shall suffer and forfeit as in " cases



“cases of high treason: and every person so affirming or maintaining after the decease of the Queen shall forfeit all his goods and chattels.”

It likewise enacteth, “That whoever during the life of the Queen shall by writing or printing declare, *before it be so established and affirmed by act of Parliament*, that any person in particular, except the issue of her Majesty, is or ought to be right heir and successor to the Queen, shall for the first offence suffer imprisonment for one year, and forfeit one half of his goods; and for the second offence shall incur the pains and penalties inflicted by the statutes of provision and praemunire \*.”

The clause of this act first cited needeth no comment. The other sheweth, that the eventual right of any individual, though grounded on common or statute law, was judged a question too big for ordinary discussion, and proper only for the discussion of the legislature.

That part of the first clause which regardeth the power of Parliament in the matter of the succession was, in substance, revived and re-enacted twice in the time of the late Queen. 4 An. c. 2.  
6 An. c. 2.

But I pass over all the acts touching the succession made at or since the revolution, which are well known. My intention in what I have now submitted to the judgment and candour of the reader was to shew, that the powers happily carried into execution by those acts have their foundation in the reason of things, in the nature of government, and in the principles of our constitution.

It may possibly be objected, that the statutes I have cited are no evidence of a *right*, they prove nothing more than *facts*. Parliaments, it may be said, have acted under an undue influence: the power of the crown hath overawed them, or the spirit of faction hath misled them. This may be true in some instances; and were it so in more, my argument would not in the least be affected by it. The statutes I have cited prove a long

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\* The printed statutes I have cited on this subject are not, as I remember, inserted at large in any collection of the statutes since *Ryhal*: 1618.

## DISCOURSE IV.

usage, an uniformity in principle and practice for many ages back. This I conceive to be a proper evidence of a constitutional right; because many of our constitutional rights are capable of no other, and were never thought to stand in need of any other: and it is no objection to any constitutional powers, that those with whom they have been lodged have sometimes acted under an undue influence.

For if the gentlemen who make the objection in the present case will be pleased to apply it to the case of parliamentary aids, or any other act of legislation, or even to the known prerogatives of the crown, which stand upon the same foot of long usage, they will soon be convinced of the weakness of it.

END OF DISCOURSE IV.

# A P P E N D I X:

## CONTAINING

The Cases of *John Midwinter* and *Richard Sims*  
on the Statute 9 *Geo. I. c. 22*, and of *John*  
*Bell* on the Statute 8 and 9 *W. III. c. 26*;  
and also an anonymous Case on the Statute  
9 and 10 *W. III. c. 41*.



# A P P E N D I X.

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## The Case of *John Midwinter* and *Richard Sims*.

**A**T the *Lent* affizes for the county of *Gloucester* 1749, *John Midwinter* and *Richard Sims* were tried before Mr. Justice *Foster* on an indictment, grounded on the statute 9 Geo. I. c. 22, for unlawfully, maliciously and feloniously killing a mare, the property of *James Lenox Dutton* Esquire.

Two men indicted on the Black-act for killing a mare; one of them being only an aider and abettor. Is he ousted of clergy?

*Midwinter* was found guilty, and received sentence of death: but the judge doubting, whether *Sims*, upon the evidence given against him, could be brought within the penalty of the statute, *so as to be ousted of clergy*, the jury by direction found the matter special with regard to him; and they found in substance, That on the 16th of *November* then last *Midwinter* and *Sims*, with one *Taylor*, who was admitted as an evidence for the King, having conceived a prejudice against the prosecutor, on account of a prosecution which he was then carrying on against them for stealing rabbits, agreed to take their revenge on him, and to kill one of his breeding mares that night; that with that intent they all went about midnight to a close of the prosecutor called *the Home-park*, where his breeding mares were kept; that *Midwinter* with the assistance of the other two caught one of the mares and buckled his own girdle about her neck, fastening a girdle of *Sims* to his own, and that *Sims* took hold of the girdle fixed in this manner to the mare's neck and held it strait, in order to prevent the mare getting away or starting from the blow, while *Midwinter* with a large sharp hook called a *bill* gave the mare a deep wound in the belly near the udder, of which wound she died that night.

The judge's doubt was, whether, as *Sims* did not give the stroke, his being present and aiding in the manner stated above will bring him within the penalty of this law, *so as to oust him*

of

*of clergy*; since the act doth not by any express provision take in aiders and abettors.

The judges had one meeting in the summer following, at Lord Chief-Justice *Lee's* chambers, to consider this case; and it was then spoken to, but very shortly, by Lord Chief-Baron *Parker*, Mr. Justice *Burnet* and Mr. Justice *Foster*. The two former were fully of opinion, that the prisoner is ousted of his clergy; the latter was of the contrary opinion. Mr. Justice *Wright* and Mr. Justice *Denison* at that meeting inclined to the latter opinion; but neither of the Chief-Justices, nor any of the judges, except those before mentioned, did then deliver any opinion: and the case was adjourned for farther consideration.

Mr. Justice *Wright* and Mr. Justice *Denison* afterwards informed Mr. Justice *Foster*, that upon full consideration of the case they concurred with Lord Chief-Baron and Mr. Justice *Burnet*; but no conference was ever afterwards had among the judges upon the case, though meetings for that purpose were frequently appointed, which by various accidents were constantly prevented.

At length in *Trinity* vacation 1751, the summer-circuit drawing near, the judge who was to sit on the crown-side at *Gloucester* waited on such of the judges as were then in town; and they declaring to him, that they concurred with Lord Chief-Baron and Mr. Justice *Burnet*, judgment of death was pronounced on the prisoner, but he was reprieved, *Midwinter*, who gave the mortal stroke, having been reprieved by the judge who tried them.

Mr. Justice *Foster*, who had seen no reason to alter his opinion, was not consulted on this occasion, he being gone to his country-house, whence he did not return till a day or two before the circuit: nor was Mr. Justice *Gundry* consulted, he likewise being gone to his country-house.

The point fully considered.

Whenever this point shall again come in judgment, it may deserve consideration, whether, *with regard to the allowance of clergy*, the offence of a person present aiding and abetting may not, in the

the construction of so penal a law, be severed from the offence of him who actually gave the mortal wound.

*Sims* was undoubtedly a felon in consideration of law: for he who takes any part in a felony, be it a felony at common-law or by statute, is in construction of law a felon, according to the share which he takes in it; if he incites and is present, he is a principal felon, but in the second degree; if he incites and is absent, he is an accessory before the fact; if he receives and harbours the principal knowingly, he is an accessory after the fact. But though, by the common-law thus operating upon the statute, *Sims* may be considered as a principal felon, because in construction of law the stroke given by *Midwinter* is the stroke of *Sims*, yet still it may be very questionable, whether *this legal fiction (for it is no more)* ought to have been carried so far as to oust him of his clergy; since aiders and abettors are no-where mentioned in the act, and acts of so penal a nature ought to be construed literally and strictly. "Where," to use the words of Lord Chief-Justice *Hale*, "a statute ousts clergy, it is only so far ousted, and only in such cases, and to such persons, as are expressly comprized within the statute; for *in favorem vitæ et privilegii clericalis*, such statutes are construed *literally and strictly*." 2 *Hale* 335, 336.

The words of the act in question are, "If any person shall unlawfully and maliciously kill, maim or wound any cattle, every person *so offending*, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death, as in cases of felony, without benefit of clergy." These words seem to limit the construction to the person actually killing, maiming or wounding, so far as to make him alone liable to the special penalties of the act; though still the persons present and aiding, *whom the rules of law, and not any express provision in this act, involve in his guilt*, will be subject to the pains and disabilities of felony, but within the benefit of clergy. 9 *Geo. I. c. 22.*

There is a passage in Lord *Hale* which seems to favour this construction. "An act, saith he, that makes an offence by name, as rape, &c. to be felony, virtually makes all that are present aiding and assisting principals, though one only doth D d " the

"the fact. Though as to the point of clergy in some cases it differs." I presume, that the difference, which his Lordship hints at, must arise from the different penning of the several acts.

1 Jac. I. c. 8.

The statute of stabbing enacts, "That every person which shall stab or thrust &c. &c."—*Page* and *Harwood* \* were present aiding and abetting one . . . . ., who made the thrust and was hanged for it; but they, though principals, were admitted to their clergy: "for, saith the report, though in judgment of law every one present and aiding is a principal, yet in the construction of this statute, which is so penal, it shall be extended only to such as really and actually made the thrust, not to those who by construction of law only may be said to make it."

3 Eliz. c. 4.

1 Hale 529.

So on the statute against larciny *clam et secretè a personâ*; "It doth not, saith Lord *Hale*, oust accessaries of their clergy, nor, it seems, doth it oust any of his clergy but him that actually picks the pocket, and not those that are present aiding and assisting, upon the reason of *Evans's* case; for it shall be taken literally." In *Steward's* case, who was indicted on this statute at the *Old Bailey* in April 1690, a person present with him and abetting had his clergy by the advice of all the justices; and this is the constant course at the *Old Bailey* †.

MS. Tracy.

39 Eliz. c. 15.

So on the statute against robbery in a dwelling-house to the value of 5s; *Evans* and *Finch* ‡ put up a ladder against a chamber-window, *Evans* opened the window; got into the chamber and stole £. 40. *Finch* stood on the ladder in the view of *Evans*, saw him in the chamber, was assisting in the robbery and took part of the money. It was ruled, that, because *Finch* did not enter the chamber, he, though a principal, was intitled to his clergy; and *Evans* had judgment of death.

\* *Ellyn* 43. *Stilk*, 86. This case is cited with approbation in 1 *Hale* 468 and other places, and by *Holt* in the case of the *Queen* and *Whiffler* in *Salk.* 542. *Farr.* 129. 2 *Lord Raym.* 842. See the arguments of the judges in *Whiffler's* case.

(† See the cases of *Innis* and *Stern* in *Leach* 7. 8.)

‡ *Cro. Car.* 473. This case is likewise cited by *Holt* in *Whiffler's* case.

*Hale,*



*Hale*, upon this statute, layeth down the rule very clearly. <sup>1 Hale 526—</sup>  
 “ It must, saith he, be a stealing IN the house; and there- <sup>528. 537.</sup>  
 fore he that steals, or is party to the stealing, *being out of the*  
*house*, is not by this statute ousted of his clergy.” He adds,  
 “ And the like law had been upon the statute 5 & 6 *Edw. VI*;  
 for these statutes only exclude the parties that actually take  
 out of the dwelling-house, not those that are present and as-  
 senters, as hath been also before declared upon the statute  
 of stabbing.”

His Lordship, in other parts of his work, speaks doubtfully <sup>1 Hale 521, 522;</sup>  
 with regard to the construction of the statute 5 & 6 *Edw.* <sup>2 Hale 359.</sup>  
*VI*\*; but never intimates the least doubt concerning the case  
 of *Evans* and *Finch* on the 39th *Elizabeth*.

Cases without number might have been cited to shew how  
 extremely tender the judges in all times have been in the con-  
 struction of acts, which take away clergy. These are cited  
 to shew how careful they have been to sever the offence of  
 those who actually committed the fact from the offence of those  
 who were barely present aiding and abetting.

With regard to the statute of stabbing, the thrust given by  
*A.* is in construction of law given by every one present aiding  
 and abetting. With regard to the statute 39 *Eliz.* the entry  
 of *A.* is in construction of law the entry of every one present  
 aiding and abetting. It is undoubtedly so in the case of bur-  
 glary at common-law: for nothing is more certain than that  
 there can be no burglary without an entry; and yet if *A.*, *B.*  
 and *C.* agree to commit a burglary, and *A.* breaks and enters,  
 and *B.* and *C.* stand without upon the watch, they likewise are  
 burglars, though they never set foot over the threshold. The  
 entry of *A.* is in construction of law the entry of *B.* and *C.*

Why did not the notion of a constructive entry prevail in  
 the one case, to oust the abettor of his clergy, as well as in the  
 other? The reason is plain; the judges in the case of *Evans*  
 and *Finch* were upon the construction of a very penal statute,

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\* *N. B.* Aiders and abettors present, and accessaries before the fact in of-  
 fences against this act and 39 *Eliz. c. 15.* are ousted by statute 3 & 4 *W. & M.*  
*c. 9.*

See 3 & 4 W.  
& M. c. 9.

which was to be taken literally and strictly. Aiders and abettors were not named, *nor described*; and if the legislature had intended to oust them, it would have done it in plain terms, as in numberless cases, which might be cited, it hath done. Their case was therefore taken to be *casus omiffus*, for which the legislature only can provide, and hath by a late statute actually provided, and will in all similar cases, whenever it shall appear to be expedient.

A distinction hath been attempted between these cases and the present. These, it hath been said, are upon statutes which take away clergy from felonies at common-law before intitled to it; this is upon a statute creating a new felony and ousting clergy. I confess, that I do not see where the difference, affecting the present question, lieth, *unless it be in favour of Sims*. The general principle, on which the cases I have cited turn, is, that penal statutes, especially statutes capitally penal, are to be construed strictly. The statute on which the present question ariseth is one of that sort. Upon the general principle aiders and abettors, *though principals in a degree*, have been admitted to their clergy. Why will not the same general principle operate upon statute as well as upon common-law felonies? I hope it will not be said, that in the case of felonies at common-law the statutes ousting clergy leave aiders and abettors, unless named or described, in their former state intitled to clergy, but statutes creating new felonies, and ousting clergy, operate not at all upon aiders and abettors, *unless they likewise are ousted*: I hope this will not be said, because it would, I think, be refining too far in a case of life. Judges have often in favour of life given way to distinctions, which possibly might never have occurred to persons who have not made the law their principal study. They have done so in favour of life; but they have very seldom done it, and, I think, never ought to do it, against the life of a man.

Besides, if aiders and abettors, not named nor described, are supposed to be ousted, lest the statute should be wholly ineffectual as to them, why are not accessories, not named nor described, likewise ousted? They are felons, not indeed declared so by the act, but in construction of law; *by the common-law*

*law operating on the statute, they become felons.* In like manner aiders and abettors present, not named nor described, are felons, and principal felons; not declared so by the act, *but by the common-law operating on the act they become so.* Why may not these therefore, as well as the others, be considered as felons; not subject to the special penalties of the act, but to the pains and disabilities of felons intitled to the benefit of clergy?

What, as I have heard, principally weighed with the majority of the judges, in the case of *Sims*, was the construction which hath been constantly put on acts of parliament touching high treason, and on those which take away clergy from murder, robbery, rape and burglary. Aiders and abettors, though not named in the statutes, have always been brought within the compass of them to all intents, and have suffered accordingly.

I think the case of treason no-wife applicable to the present question. Aiders and abettors in high treasons of all kinds are traitors, as aiders and abettors in felonies of all kinds are felons. Thus far the cases run together: but when we proceed to the consequences of a conviction, *which is the present question*, there the cases differ most materially. Every species and every degree of high treason is punished with death, from the treason of him who commits the fact to his who knowingly receives and harbours him, except in a few cases wherein special statutes have otherwise provided; but felonies of every kind and degree are not at present so dealt with: and therefore in a question touching the allowance of clergy nothing can be inferred from the extreme, but in most cases necessary rigour of the law in the case of high treason.

With regard to the statutes ousting clergy in the cases of murder &c, it may be thought a matter of too great nicety to say, that those acts take away clergy from the offence generally, and not barely from the persons committing the fact, as the act on which the present question ariseth doth. This distinction may be thought a little nice; and yet it hath been countenanced by great authority\*. But this point will not rest

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\* See Lord Holt's argument in *Whistler's case* in *Farristley* and *Ld. Raymond*.

solely on that distinction: for the offences ousted of clergy by these acts are expressed in terms, not only of well-known signification, but in terms which, at the time of making the acts, and for an age or two before, *did incontestably include the offence of persons present aiding and abetting, as well as of those who actually committed the fact.*

1 Edw. VI. c.  
12. § 10.

"No person, saith the act of *Edw. VI.*, that hath been, or shall be, *convicted* of murder of malice prepensed,—or of or for robbing any person in the highway or near to the highway—shall be admitted to have the benefit of his clergy."

18 Eliz. c. 7.

"If, saith the statute of *Elizabeth*, any person shall fortune to commit any manner of felonious rape, ravishment or burglary, and *to be found guilty by verdict of any such felonious rape or burglary*, or shall fortune to be outlawed *for any the offences aforesaid*, or upon his arraignment shall confess *any such felonious rape or burglary*—, he shall suffer death—without any allowance of the benefit of clergy."

The persons who are the objects of these acts are persons *convicted* of murder, robbery, rape or burglary. Now, who were liable *to be convicted* of these crimes at the time these acts were made? Undoubtedly persons present aiding and abetting. The difference therefore between these acts and that on which the present question turns is plainly this: one is totally silent with regard to aiders and abettors; the other statutes describe the persons who are the objects of them in terms which take in aiders and abettors, *and were known to do so at the time the acts were made.*

3 Inst. 59.  
1 Hale 670.

Lord Chief-Justice *Coke* saith, that in the case of buggery persons present and abetting are principals. *Hale* concurs with him, and adds, that they are ousted of their clergy. I do not know, that the latter point hath ever come in judgment: but I think, that the opinion may be well founded on the letter of the statute, which takes away clergy from the offence under *a well-known denomination*, and not barely from the persons committing the fact. "Forasmuch as there is no sufficient and condign punishment for the detestable vice of buggery with  
mankind

25 H. VIII. c.  
6. revived by 5  
Eliz. c. 17.

mankind or beast; Be it enacted, that *the same offence shall* from henceforth be adjudged felony, and that no person *offending in any such offence* shall be admitted to his clergy."

Lord Coke tells us, that in penning the act the word *person* was made choice of on purpose to include both sexes: and very probably the extensive words *person offending in any such offence* were used, in order to take in every one who should be present at a scene of such detestable lewdness, and bear any part in it, whether as agent, patient or abettor. The words certainly include them all: and as to the two former, words of a less general extent would have taken them in; for, supposing a mutual consent, both the agent and patient may, in strict propriety, be deemed actual perpetrators of the crime, each acting a part, different indeed, but equally necessary towards the perpetration of it. The case of buggery therefore differs widely from the present. In that case aiders and abettors come within the description of the act; in this the act is silent as to them. Aiders and abettors in the case of buggery, being persons offending *IN* the offence, may be ousted; but accessaries before and after in buggery, whose offences are precedent or subsequent to the fact, certainly are not.

It may, I think, be laid down as a general rule, That indictments grounded on penal statutes, especially the most penal, must pursue the statute, so as to bring the party precisely within it: and this rule holds as well with regard to statutes which take away clergy from felonies at common-law, as to statutes creating new felonies. "The indictment, saith *Stanford*, must set forth the offence in such manner as it is expressed in the statute, otherwise the offender shall have his clergy."

2 Hale 336.  
11 Co. 37. a  
Fo. 130. B.

In the case of rape, which was felony, though not capital, at common law, and was made capital by the statute of *Westminster* the second, the words of the statute are, "If any man *ravish* dame or damosel." *A.* was indicted on the statute, that he feloniously took *Alice-at-Stile*, and had carnal knowledge of her against her will, without saying *quod rapuit*. Two of the judges were of opinion, that the indictment was insufficient, because the words of the statute were not pursued; for, saith the book, *we cannot take any thing by intendment in a*

9 Edw. IV.  
fo. 26.

*case of felony.* Another judge thought, that the indictment might be supported, because the matter set forth, *viz.* that he took her and had carnal knowledge of her against her will, fully imported, that he ravished her.

Tit. Indictment  
pl. 7.

Brooke, who abridgeth this case, concurs with the judges who thought the indictment insufficient: and this opinion is holden to be good law to this day.

Dyer 304.  
pl. 56.  
Stanf. 130. B.

So if the indictment chargeth, that the defendant *voluntariè, felonice et ex malitiâ præcogitatâ interfecit*, without saying *murdravit*, which is the word the statute useth, it amounts to no more than an indictment for manslaughter, and the offender shall have his clergy.

So in the case of buggery, it was never thought sufficient to charge, that the defendant *in quendam A. B. insultum fecit, et cum eo felonice contra naturam rem veneream habuit, ipsumque A. B. carnaliter cognovit*, which sufficiently describes the offence to a common intendment; but because the statute describes the offence by the term *buggery*, the indictment goes on and chargeth *peccatumque illud sodomiticum Anglicè dict' buggery adtunc et ibidem nequitèr, felonice, &c. commisit et perpetravit*. See in *Co. Ent.* 351. b. a precedent settled by great advice; and all the precedents.

Kel. 8.

So in the case of the regicides, it was thought necessary precisely to pursue the words of the statute of treasons. Accordingly the indictment charged, that they compassed and imagined the death of the king: and the actual murder of the king was laid as the overt act of such compassing and imagination, though one of the prisoners was supposed to have given the blow.

Cases without number might be cited which turn upon this general principle, That indictments upon penal statutes must strictly pursue the statute. I have mentioned a few wherein the fullest description of the offence, were it even in the terms of a legal definition, would not be sufficient without keeping close to the words of the statute: and if these cases be law, if the general principle on which they turn be true, which nobody hath ever yet denied, it will, I think, follow, that *Sims*,  
had

had he been indicted as an aider and abettor, could not have been ousted of his clergy, aiders and abettors not being named in the act: nor could it have been said, that he, being charged as an aider and abettor present at the fact, is sufficiently charged with the fact itself, merely because in construction of law aiders and abettors may be said to have committed the fact.

Lord *Hale* puts a case which I think much stronger than the present, supposing *Sims* to have been indicted as an aider and abettor. *A.*, *B.* and *C.* are indicted on the statute of stabbing, and the indictment chargeth, that *A.* made the thrust, and that *B.* and *C.* were present aiding and abetting. It comes out on evidence, that *B.* made the thrust, and that *A.* and *C.* were present aiding and abetting. This evidence upon such an indictment for murder, or manslaughter at common-law, would have been sufficient to convict them all: but in the case put his Lordship is clear, that "not only *A.* and *C.* who gave not the stroke, shall have their clergy, but also *B.* because though the case of *B.* is within the statute, yet as to him *the indictment brings him not within the statute.*" If Lord *Hale* be warranted in this opinion, as I think he is, *Sims*, had he been indicted as an aider and abettor, could not have been ousted of his clergy; because, to borrow his Lordship's words, the indictment would not have brought him within the act: and, in my opinion, this special verdict, which finds him to have been no more than an aider and abettor, doth not bring him within it. In the case put by Lord *Hale* the person who actually made the thrust was, in his opinion, intitled to his clergy, because he was charged only as an aider and abettor; and it would sound, I think, extremely harsh to say, that *Sims* who is found by this verdict to have been no more than an aider and abettor is ousted.

Before I conclude I will briefly consider how the law antiently stood with regard to aiders and abettors present at the fact, but not actual perpetrators of the crime; upon what grounds the law was altered with regard to them; and how far that alteration affected their case at the time it was introduced. This inquiry may probably throw some light upon the principal question.

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In antient times these persons were considered not as principals, but as accessaries AT the fact; and consequently were not liable to answer till the principal should be convicted or outlawed.

*Brañon* \* saith, "Appellati vero *de forciâ* salvo attachientur, quousque appellati *de facto* convincantur."—"Si omnes præfentes sint, tam *de forciâ* quam *de facto*, procedatur contra omnes per ordinem; dum tamen illi *de forciâ* non respondeant, antequam *factum* vincatur †." That by the *appellati de forciâ* this author means persons present and assisting in the fact, but not actual perpetrators, appears by the substance of an appeal, which he sets forth in the next section. "*A.* appellat talem *de forciâ*, quod venit idem talis cum prædicto *B.* (the principal) et tenuit ipsum *C.* (the deceased) quamdiu idem *B.* illum interfecit; vel vinxit eum &c.—quo magis ipse *C.* fuit interfectus."

Lib. I. c. 31.  
f. 8.

*Fleta* saith, "Appellati *de forciâ*, consilio, præcepto, auxilio vel receptamento, donec *principales* convincantur *de facto*, respondere non debent—sed tunc demum cum convicti fuerint *principales* poterunt illi *de forciâ*, et alii, sic appellari; *A.* appellat *E.* &c.—" much in the form set down by *Brañon*.

De coron. c. 28.  
f. 4 & 5.

So with regard to an appeal of rape, *Brañon* saith, "Factâ executione judicii de corruptore, procedat appellum versus eos qui appellati sunt *de forciâ*. *Possunt enim esse plures* in *forciâ*, *sed tamen unus tantum tenebitur de corruptione*.—Eadem *A.* appellat *C.* quod eodem die quo prædictus *B.* (the principal) et eadem horâ, dum idem *B.* abstulit pucellagium suum, fuit idem *C.* in *forciâ*, ita quod tenuit eam dum idem *B.* abstulit ei pucellagium suum."

In the year-book 40 E. III. 42. the defendant in an appeal, who was charged with being present and directing a murder, was let to mainprize, *quia accessory*: and the Mirror enume-

C. 1. f. 13.

\* De coron. c. 8. f. 3. and c. 12. f. 9. to the end of the chapter.

† C. 19. f. 4 and 5. and to the same purpose see 4 E. I. R. 2. *de officio coronatoris*.



rating the several sorts of accessaries, among others, mentioneth *ceux que sont en la force*.

I am sensible, that Lord Chief-Justice *Coke* in his Comment on *Westminster I. c. 14.* understood the words, "None shall be outlawed upon appeal of commandment, *force*, aid or receipt," to import no more than a proceeding against accessaries before and after the fact: and I admit, that, in order to reconcile the law touching aiders and abettors, as it now stands, to that act, the words must be so understood; though *Stanford* takes the word *force* to have imported *originally* one present and abetting. "But, saith he, the law is not so at this day." However nothing can be plainer than that *Brañton* and *Fleta*, who wrote about the time of the act, one a little before, and the other soon after the passing of it, when they speak of persons appealed *de forciâ*, mean those who were present at the fact aiding and abetting. The appeal *de forciâ*, the substance of which they give us, incontestably proves this. It likewise shews what the law was at that time: for the established rules of pleading speak the general sense of the age in which they prevail.

Stanf. 41.

The oath of the defendant in an appeal *de forciâ* upon joining battle, the substance of which we have in *Brañton*, is to the same purpose; "Quod non venit cum tali, qui appellatus est et convictus de facto, nec ipsum talem (the deceased) tenuit, nec ligavit, nec aliam forciam ei intulit, dum prædictus talis eum occidit; vel plagavit, per quod mortuus fuit." *Brañton* in the next section, speaking of the same proceeding, saith, "Si appellatus victus fuerit, eandem poenam sustineat, quam sustinuit ille de facto. Dicitur enim vulgaritèr, quod satis occidit qui præcipit, vel qui malo animo tenet dum quis occiditur; et ad paria judicantur in utroque delicto, quantum ad poenam."

De coron.  
c. 21. f. 2.

At the time when these authors wrote, and indeed for a long time afterwards, the law was taken to be, that persons present aiding and abetting were to be considered in the rank of accessaries, not liable to answer till the principal was convicted or outlawed: but the mischiefs of this rule were very great and many. The persons who were then esteemed the only principals might die before conviction: their accomplices might dispatch them, in order to procure their own indemnity; and

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40 E. III. 42. 2.  
Lib. Ass.  
240. b. 245. 2.

it is no improbable supposition, that persons whose hands have been once dipped in blood should do so. The principals might be persons wholly unknown, or they might not be distinguishable from the rest of the party in the confusion, which usually attends the perpetration of enormous offences, where numbers are concerned. In all these cases, and others which might be mentioned, by too strict an adherence to this rule the hands of justice would be for ever tied up with regard to the accomplices: and whenever the principals could lie concealed or flee, the course of justice against the accomplices was very much retarded.

If I may be allowed to make a conjecture, I would say, that to obviate these mischiefs, *and with that view alone*, the judges by degrees came into the rule of law, as it now stands, *That all present and abetting are principals*. Which rule was by no means settled till after the time of *Edward III*: and so late as the 1st of Queen *Mary* a chief-justice of *England* strongly doubted of it, though indeed it had been sufficiently settled before that time. What strengthens my conjecture is, that it appears by the cases cited in the margin \*, wherein the point came under consideration, that the persons who gave the mortal wounds, for they are all cases of murder, were fled from justice; and that none beside the persons present and abetting were amenable: and probably in the other cases † the fact might be so, though the reporters are silent as to that circumstance; and I the rather think so, because I do not at present recollect any case, wherein, as the law then stood, the distinction between principals and accessaries could be any way material, unless it were to determine, whether the prisoner should take his trial immediately, or must wait for the conviction of another person, who possibly might not then be amenable to justice.

It is certain, that the distinction did not affect the life of the party; for with regard to the effect of a conviction, before the statutes which took away clergy, principals and accessaries of all sorts came under one and the same rule. If the crimi-

\* See 25 E. III. 45. b. 40 E. III. 42. a. Lib. Ass. 240. b. 245. a. 21 E. IV. 71. a.

† See 9 H. IV. 14. a. 4 H. VII. 18. a. 13 H. VII. 10. a.

nal was a clerk or qualified to be so, of which reading was made the test, he was admitted to his clergy, though a principal in the highest degree; on the other hand, if he was a person not capable of *the privilegium clericale*, as women and many other persons were not, he was liable to suffer death upon conviction or attainder, though no more than an accessory in the lowest degree; for *in those days* all felonies, except petit larciny and mayhem, were capital, unless the party was capable of the privilege of clergy; which, where it was allowed, extended to all felonies alike. But the wisdom of later ages hath happily inverted that rule. The allowance or non-allowance of clergy doth not now depend upon the function or capacity of the offender, but on the nature of the offence: and, where clergy is allowed, it is by late acts \* extended to all ranks and orders of men. So that in the construction of statutes which take away clergy, the question, whether principal or accessory, is *now* become a matter of extreme consequence to the prisoner; it is in many cases life or death to him: but that was not the case, when the judges began to consider aiders and abettors, not as accessories *at the fact*, but as principals *in it*. This they did, and I think very rightly, in order to bring great offenders to their trial, but without any view of enhancing their punishment upon conviction; for, had a departure from the antient rule affected the prisoner's life upon conviction, I think that the judges would still have adhered to the rule, notwithstanding the mischiefs I have mentioned, till the legislature should think proper to interpose and provide a remedy.

If what I have said shall be thought to account for the introduction of the present rule with regard to aiders and abettors, it may likewise serve to determine the extent of it, and to evince the wisdom and equity of the resolutions in the cases of *Page* and *Harwood*, and of *Evans* and *Finch*, and other cases before cited. The judges in those cases admitted the rule in it's due latitude, but refused to extend it, *in all it's possible consequences*, to a question, I mean the question touching the allowance of clergy,—a question which did not exist, nor

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\* See 3 & 4 W. & M. c. 9. s. 6. 5 Ann. c. 6. s. 4.

could

could possibly be in the contemplation of the judges, in the light we consider it, at the time that doctrine was first received and established.

### The Case of *John Bell*.

A man indicted for high treason on the statute 8 & 9 W. III. c. 26. for having in his custody a press for coinage.

THE defendant was indicted at the *Old Bailey* in 1753, on the statute 8 & 9 W. III. c. 26, That he not being a person employed in or for the mint or mints of our Lord the King in the Tower of *London* or elsewhere, and for the service of the said mints only, nor being a person lawfully authorized by the Lord High-Treasurer or Commissioners of the Treasury, knowingly, feloniously and traitorously had in his custody a press for coinage without any lawful authority or sufficient excuse for that purpose, against the duty of his allegiance &c.

Sir Dudley  
Ryder.

Upon the trial a doubt arose, whether the evidence was sufficient to bring the defendant within the act: and thereupon by the consent of the Attorney-general on the part of the crown, and of the defendant's counsel, the prisoner was found guilty; but judgment was respited by consent until the opinion of all the judges could be had upon the points of law arising upon the evidence.

This matter rested till *June* 1755, when the following state of the evidence was agreed on, and signed by counsel on the part of the crown and of the defendant.

"It was proved, that the defendant knowingly had a press in his house and custody, of the same sort as those used in the mint for coinage, and proper to be made use of for coining guineas, shillings and *Louis d'ors*, or any other less pieces, but not large enough for coining crowns and half-crowns."

"It was not proved, that it was ever made use of, or intended to be made use of, by the defendant for coining any of the current coin of this kingdom: but it was proved, that it was intended to be made use of by him in coining *Louis d'ors* and other foreign pieces, not the current coin of this kingdom."

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“ It was likewise proved, that this prefs was proper to be made use of for making medals, dial-plates for watches, buttons and several other things : but it was not proved, that the defendant ever made use, or intended to make use, of this prefs for making any of these things.”

“ It was also proved, that such presses as the present are in many tradesmen’s shops in town, and are made use of by them, in the way of their trades, for making watch-keys, watch-chains, dial-plates for watches, cane-heads, buttons and divers other things ; and were never, as the witnesses had heard, made use of by any of them for coining any sort of money.”

“ There was no proof on the part of the defendant, that he was a person employed or to be employed in his Majesty’s mint or mints in the Tower of *London* or elsewhere, and for the use and service of the mints only ; or that he was a person lawfully authorized by the Lords Commissioners of the Treasury, or the Lord High-Treasurer of *England* for the time being ; or that he had any lawful authority, or *any excuse but as aforesaid*, for having the said prefs in his custody or possession.”

The case was argued in *Serjeants-inn Hall* before all the judges, on the 30th of *June* 1755 : and some days afterwards, at a conference among the judges at Lord Chief-Justice *Ryder*’s chambers, two questions were made.

First, Whether a prefs for coinage is one of the tools or instruments within that clause of the act on which this indictment is founded.

Second, Supposing it to be within the clause, whether the facts stated in the case amount to a *sufficient excuse*, so as to take the defendant out of the penalties of the act.

Upon the first question Lord Chief-Justice *Ryder* was of opinion, that a prefs for coinage is not one of the tools or instruments within the clause of the act on which this indictment is founded. He thought, that an act so penal ought to be construed with great strictness, and that unless the defendant’s case can be brought within the very letter of the clause, he cannot be guilty of high treason.

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He admitted, that a press for coinage is named before you come to the clause on which the indictment is founded, and that this clause, after enumerating some of the tools and instruments proper for coining, concludes with these general words, "or other tool or instrument before mentioned:" but he thought, that the press not being named *in this clause*, it could not be brought within the words, *other tool or instrument before mentioned*.

To this purpose he cited *Stra.* 496 and 1098\*, That a gun, though very proper for killing game, and commonly used for that purpose, yet not being named in the fifth of *Queen Anne*, is not within the general words of the act, "other engines to destroy the game."

See 7 & 8 W.  
III. c. 19. § 4.

He thought likewise, that the words, *other tool or instrument before mentioned*, might be sufficiently satisfied by extending them to the tools &c. mentioned in the first clause of the act, where the coining press is likewise omitted: and he was the rather inclined to put this construction upon the act, because the legislature had but the session before inflicted a heavy penalty, no less than five hundred pounds, beside the forfeiture of the press, on all persons having presses in their custody; and as it may, he thought, be reasonably presumed, that the legislature did not intend to make the same offence high treason, before a proper trial could have been made what effect a pecuniary penalty would have, he supposed the coining-press to be for that reason purposely omitted in this clause of the act.

Upon the second question his Lordship was clearly of opinion, that, supposing the coining-press to be within the clause, none of the facts stated in the case amount to a *sufficient excuse*, so as to take the defendant out of the penalties of the act.

He said, that though the statute, on which the prosecution is founded, might carry an air of some severity, yet if the offence is plainly within the letter and intention of the act, and the defendant hath no excuse to take him out of it, it is the proper province of the judges, *jus dicere et non jus dare*. The

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\* (*Rex. v. Gardner.* B. R. Trin. 11 Geo. II. The case is also reported in *Andrews* 255.)

intention

intention of the legislature in this act, and in that now cited, was, as far as it was possible, to take from the subject all means or possibility of counterfeiting the coin, as any-one may see, who will read the preambles of the acts with due attention. The ultimate end of both is the same; the means they both propose are to keep the tools and instruments, commonly used in coining, out of private hands. The former regards the coining-press only: the latter, plainly founded on the same principle, and pursuing the same end by means of a similar nature, extends to other instruments of coining, and, among other offences, makes it high treason knowingly to be possessed of them without lawful authority or sufficient excuse.

The facts stated in the case plainly bring the defendant within the words and intention of the act, supposing a coining-press to be within the clause under consideration, unless any of the facts stated amount to a sufficient excuse.

One part of the excuse insisted upon is, that the press was never made use of for counterfeiting the current coin of the kingdom: but that circumstance alone doth not carry with it even the shadow of an excuse within the meaning of this act; because, if the defendant had made use of it for that purpose, he would have been guilty of high treason without the aid of this act.

It is farther stated, that the defendant never intended to make use of the press for that purpose; and thence it is inferred, that he is not within the act: but there is not a single word in the act which makes the intention of the party an ingredient in the case. If it be an ingredient in the present case, it will be equally so in the case of making or mending, buying or selling, and indeed in every other case provided for by the act: and such a construction once admitted, the whole system of the act will be overturned; for the act, with the sole view to prevent coining, hath made certain facts preparatory to that offence, and capable of clear proof, high treason. The construction now contended for introduceth another fact, *the intention of the party*, as matter of evidence and a necessary

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ingredient

ingredient in the case, a fact which in most cases is extremely difficult, and in some impossible, to be proved.

It is objected, that the defendant intended to make use of the press for coining *Louis d'ors* and other pieces of foreign coin; and this criminal intention is called a sufficient excuse: but let it be remembered, that the intention of the act was, as far as possible, to keep all the means of coining out of private hands; that the press was fitted for coining the coin of the kingdom, as well as foreign coin, and might have been made use of for either purpose; let this be admitted, and it will be found to be no excuse within the sense and meaning of this act for the defendant to say, "I intended the press for a very wicked purpose, but not for the worst it was adapted to; I intended to commit misprision of treason, but not high treason:" for the words, *sufficient excuse*, under which the defendant would shelter himself, certainly mean in this act, as they do in all language, an honest, a fair, a reasonable excuse, an excuse which an honest man may make without blushing.

His Lordship concluded, that none of the facts stated in the case amount to an excuse, supposing the press to be a tool or instrument within the meaning of the act: but for the reasons given in his argument on the first question, he thought the defendant not guilty of high treason.

(See Lennard's case in 2 Black. R. 807. 822. and in Leach 85.)

Some of the judges doubted on the first question, but much the greater part were clear, that a press for coinage is within the clause of the act on which this indictment is founded. It is expressly named among other tools and instruments for coining in the clause next before that in question, and consequently must come within the words *other tool or instrument before mentioned*; otherwise those words of reference, plainly intended to take in some things not expressly named, would stand for nothing: and to carry the words of reference back to the first clause, passing over that immediately preceeding, is contrary to all the known rules of construction; *ad proximum antecedens fiat relatio*. As to the case cited from *Strange*, the gun is not once named in the act; if it had been named, the general words must have taken it in: besides, guns may be, and



and often are kept, and prudent it is to keep them, for a man's necessary defence, without any purpose of destroying the game \*.

It was observed too, that the coining-press is named in the second and fifth sections of this act, among other tools or instruments proper for coining; and that in that light it is likewise mentioned in the statute 7 & 8 W. III. c. 19.

Those judges who doubted on this question laid no great stress on that doubt; for they were clear with the defendant on the second, that the facts stated in the case amount to a sufficient excuse; and in this opinion all the judges, except Chief-Justice Ryder and Justice Foster, concurred.

They thought, that the sole object of this act, and also of the 7 & 8 W. III. cited by Lord Chief-Justice Ryder, was to prevent the counterfeiting *the current coin of this kingdom*. The statute 7 & 8 W. III. recites, "That the greatest security against counterfeiting *the new-intended coin of this realm* by the mill and press is the difficulty of being provided with fit tools or instruments for the doing thereof;" and then enacts among other things in the manner hinted at by the Chief-Justice. The title of the act now under consideration is, "For preventing the counterfeiting *the current coin of the kingdom*;" and the act recites, "Notwithstanding the good laws still in force against the counterfeiting the monies and coins of *this realm*, yet the said offence doth daily increase:" and for redress of this great and growing mischief it enacts &c. &c.

They observed too, that the first, second, third and fourth sections make use of terms descriptive of the current coin of the kingdom and no other; and that the persons excepted out of the act are those employed in his Majesty's mints, or having lawful authority from the Lord High-Treasurer or Commissioners of the Treasury.

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\* See the act declaring the rights and liberties of the subject, and settling the succession of the crown, 1 W. & M. sess. 2. c. 2. "The subjects which are Protestants may have arms for their defence suitable to their conditions, and as allowed by law." A claim of this kind made upon so great an occasion cannot be supposed to have been given up by any of the laws for the preservation of the game.

From these observations on the act they inferred, that the proper coin of the kingdom was *the sole object of it*.

It was farther observed by one of the judges, who argued on this side of the question, that, in the judgment of the legislature itself, the remedies provided by this act are confined to the coin of the kingdom; for the statute 1 Ann. sess. 1. c. 9, which gives this act a farther continuance (for it was originally a temporary act) recites, "That it had been found of good use for suppressing the counterfeiting *the current coin of the kingdom* by such tools or instruments as are therein prohibited."

They all admitted, that the act sometimes makes use of words of a large import; but they thought, that, the whole tenor of the act considered, those words ought, in the construction of so penal a law, to be confined to that species of coin which they conceived to be the sole object of the attention of the legislature at the time when the act was under consideration: and since it is stated in the case, that there was no proof, that the defendant *intended* to make use of the press in question for counterfeiting the current coin of the kingdom, but on the contrary that *it was intended* to be used in counterfeiting *Louis d'ors*, and other foreign coin, they concluded, that this intention, though highly criminal, would be sufficient to take him out of the act. It is indeed a very unfavourable excuse, that he intended to commit misprision of treason; but still that excuse, bad as it is, will take his case out of the act: for it would be absurd, and against all the rules of proportion, to make the steps preparatory to a crime high treason, where the crime itself, had it been committed, would have been no more than misprision of treason.

If the defendant had made or mended, bought or sold, or had in his custody, a stamp, mould or dye for coining *Louis d'ors*, he could not be guilty of high treason within the act; since the clause touching those tools is expressly confined to stamps &c. for coining *coin current within the kingdom, which Louis d'ors are not*: and by a parity of reason the having a press intended for counterfeiting that sort of coin and no other cannot be high treason.

One of the judges, who thought the intention of the party a material circumstance in the case, mentioned the resolution of the court in the case reported in *Stra.* 1098, from his own note of it; That a gun could not be considered as an engine for killing the game within the fifth of Queen *Anne*, unless it had been kept and used for that purpose, and that the once using of it for that purpose would have determined with what intent it was kept; and he observed, that the conviction being silent with regard to the circumstance of using it, it was quashed.

Mr. Justice *Foster* concurred with the majority of the judges upon the first question. Upon the second he concurred with Lord Chief-Justice *Ryder*, for the reasons offered by his Lordship.

He said farther, that if the defendant had been proved to be a person concerned in any of the manufactures in which presses of the nature of that in question are now publicly used, this circumstance would have amounted to a sufficient excuse within the meaning of the act, unless it had been proved, as it was in this case, that he intended the press for the purpose of coining; for though the act hath made no express provision for innocent manufacturers, probably because engines of that sort were not in use at that time for any other purpose than the purpose of coining, yet in the construction of all acts, especially of acts highly penal, the circumstances, and the known and allowed usage of the times ought, as much as possible, to be taken into consideration: and therefore an innocent manufacturer may now shelter himself, by way of excuse, under the known usage of the present age, though that excuse might not be in the contemplation of the legislature at the time of making the act. But the defendant cannot avail himself of this excuse, since it is expressly stated in the case, that he was not concerned in any of those manufactures, and that he kept the press for the purpose of coining.

He agreed, that the principal view of the act seems to have been to prevent the counterfeiting the proper coin of the kingdom; but he thought this not to be the sole view of it; for he observed, that in the clause which enumerates and describes

the tools or instruments for making the impresson on the coin, such as the puncheon, counter-puncheon &c, the words *coin current within the kingdom* are made use of, and enter into the description of those instruments. These words in the language of the statutes concerning the coin take in, not only *the proper coin of the kingdom*, but *such foreign coin as is made current by royal authority*. They are indeed most commonly appropriated to the latter; but they undoubtedly extend to both, and in some of the statutes \* must be so understood, as any one may see, who will read them with due attention.

The puncheon, counter-puncheon and other instruments of that sort, he observed, are formed for making that single impresson on the metal for which the maker designed them; as a seal makes on the wax that impresson alone which is correspondent to it: and therefore in the description of those tools, they are, with great propriety, confined to those coins, the counterfeiting of which is high treason.

The legislature saw the absurdity and disproportion which hath been mentioned, and hath wisely kept clear of it: but that is not the case of the press for coinage. This engine is fitted as well for counterfeiting the coin of the kingdom as any other coin: and therefore with equal propriety the penalties of the act are extended to it, even admitting, for argument's sake, the coin of the kingdom to have been the sole object of the act; otherwise the intention of the legislature, which, as Lord Chief-Justice *Ryder* observed, was to keep all means, all possibility of coining but of private hands, would have been intirely frustrated.

*N. B.* His Majesty soon afterwards, upon a report of the opinion of the judges from the Chief-Justice, was pleased to grant the defendant a free pardon under the great seal.

*N. B.* The suffering the defendant to be convicted of high treason subject to the opinion of the judges, instead of directing a special verdict, which ought to have been done, was much

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\* See 1 Mar. sess. 2. c. 6. 1 and 2 P. and M. c. 30 and 31. 5 Eliz. c. 11. 14 Eliz. c. 3. and 18 Eliz. c. 1.

censured among the judges, and also by Lord Chancellor *Hardwicke*, when the defendant's pardon came to the great seal.

An anonymous Case on the Statute 9 and 10  
W. III. c. 41.

**T**HERE was a case in the *Western* circuit before Mr. Justice *Foster*, which hath, in some of its circumstances, a resemblance to the before-reported case of *John Bell*.

A woman indicted for having in her custody some pieces of canvas contrary to the statute 9 and 10 W. III. c. 41.

A widow-woman was indicted on the statute 9 and 10 W. III. c. 41. for having in her custody divers pieces of canvas marked with his Majesty's mark in the manner described in the act, she not being a person employed by the commissioners of the navy to make the same for his Majesty's use.

The canvas was produced at the trial marked as charged in the indictment, and was proved to the satisfaction of the court and jury to be of that sort which is commonly made for the use of the navy, and to have been found in the defendant's custody.

The defendant did not attempt to shew, that she was within the exception of the act, as being a person employed to make canvas for the use of the navy: nor did she offer to produce any certificate from any officer of the crown touching the occasion and reason of such canvas coming into her possession.

Her defence was, that when there happened to be in his Majesty's stores a considerable quantity of old sails, no longer fit for that use, it had been customary for the persons intrusted with the stores to make a publick sale of them in lots, larger or smaller as best suited the purpose of the buyers; and that the canvas produced in evidence, which happened to have been made up long since, some for table-linen and some for sheeting, had been in common use in the defendant's family a considera-

ble time before her husband's death, and upon his death came to the defendant, and had been used in the same publick manner by her to the time of the prosecution. This was proved by some of the family, and by the woman who had frequently washed the linen.

This sort of evidence was strongly opposed by the counsel for the crown, who insisted, that, as the act allows of but one excuse, the defendant, unless she can avail herself of that, cannot resort to any other: for if the canvas was really bought of the commissioners, or of persons acting under them, which is the only excuse pointed out by the statute; why was no certificate of that matter taken at the time of the purchase, since the fourth section of the act admits of that excuse, and the second section admits of no other?

But the judge was of opinion, that though the clause of the statute, which directs the sale of these things, hath not pointed out any other way for indemnifying the buyer than the certificate; and though the second section seems to exclude any other excuse for those in whose custody they shall be found: yet still the circumstances attending every case, which may seem to fall within the act, ought to be taken into consideration; otherwise a law calculated for wise purposes may, by too rigid a construction of it, be made a handmaid to oppression. There is no room to say, that this canvas came into the possession of the defendant by any act of her own. It was brought into family-use in the life-time of her husband, and it continued so to the time of his death; and by act of law it came to her. Things of this kind have been frequently exposed to publick sale; and though the act points out an expedient for the indemnity of the buyers, yet probably few buyers, especially where small quantities have been purchased at one sale, have used the caution suggested to them by the act. And if the defendant's husband really bought this linen at a publick sale, but neglected to take a certificate, or did not preserve it, it would be contrary to natural justice, after this length of time, to punish her for his neglect. He therefore thought the evidence given by the defendant proper to be left to the jury,  
and

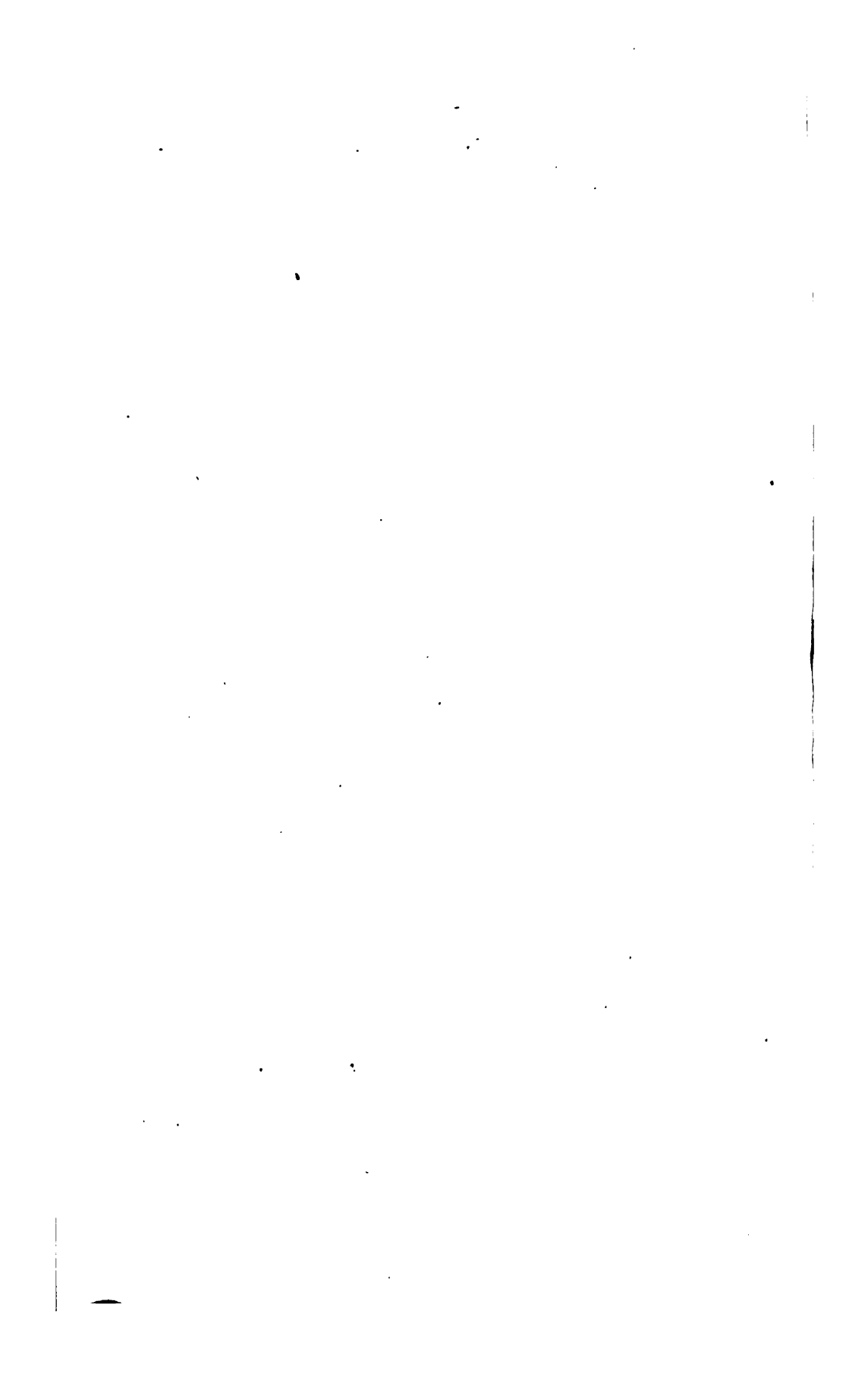
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and directed them, that if, upon the whole of the evidence, they were of opinion, that the defendant came to the possession of the linen without any fraud or misbehaviour on her part, they should acquit her : and she was acquitted.

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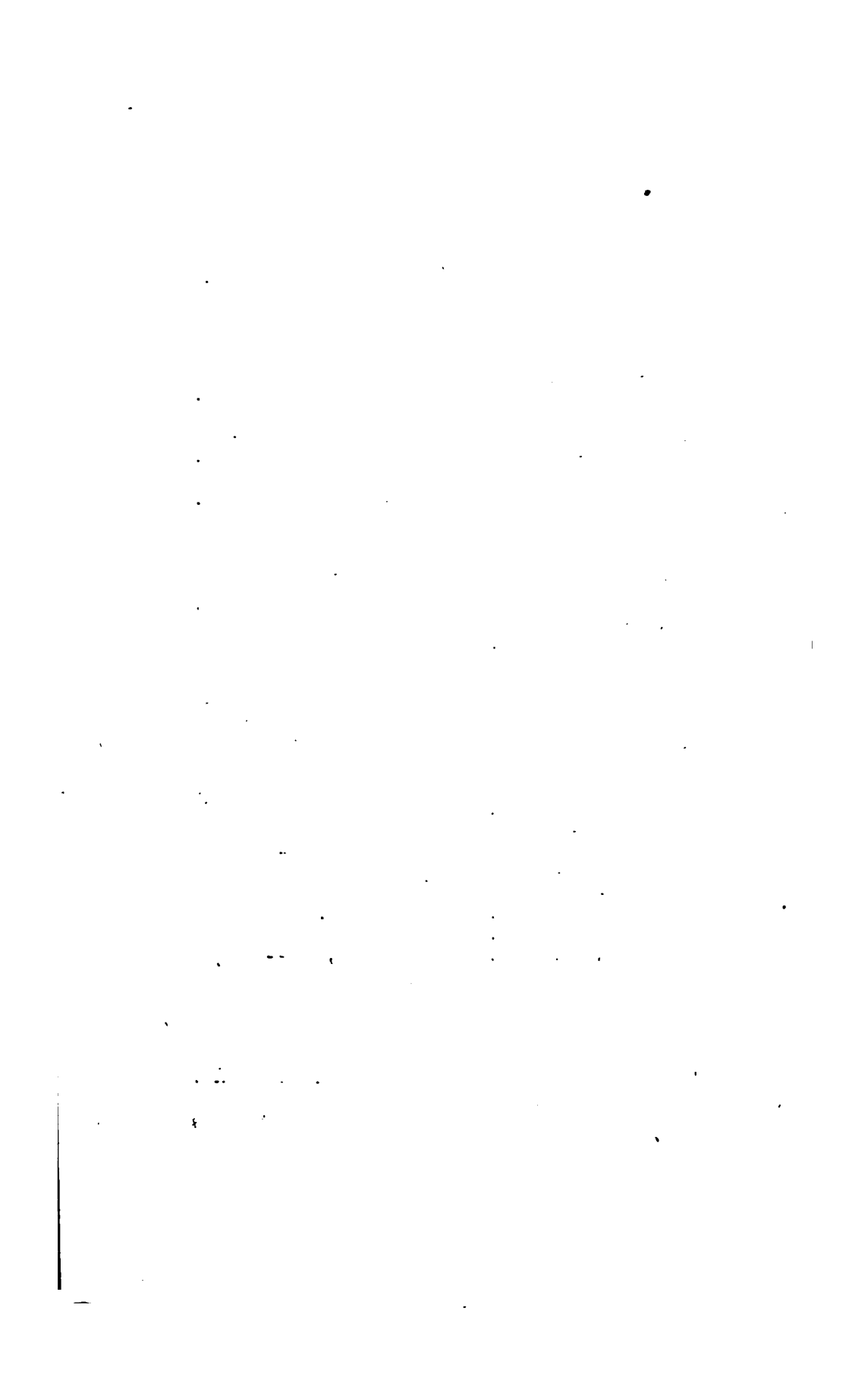
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*published from the original MS, comprized in one thick folio volume.* This mistake, which I am heartily sorry for, I was led into by the editor's confused and inaccurate manner of writing in this part of his preface. "The reader, he  
"faith, may be assured, that the edition here  
"offered to the publick is printed FAITH-  
"FULLY from the author's original MS, *which*  
"consists of one thick folio volume all in our au-  
"thor's own hand-writing." This led me to say, that the transcript was *totally* laid aside: for if the work was *faithfully* published from the original MS, what use can the reader suppose to have been made of the transcript?

The editor, it is true, speaking of the transcript a few lines lower doth say, "This transcript therefore so far as revised and corrected  
"by our author, and no farther, may be deemed  
"the original finished and perfected." If he had added, *that the corrections are inserted in this edition*, or had used words of the like import, I should have made no sort of doubt of it: but this, for a reason I shall presently offer, could not be said with truth. I find, that all the passages which are authenticated by the author's corrections and additions, except two, are inserted in the print. One of these, which, in my opinion, carries with it evident marks of authenticity, is in the first volume of the transcript towards the end, and takes up near eight

b

pages.

pages. It turns upon the question, Who is or is not a King within the statute of treasons?

It is too long to be inserted in this place : and as the most material parts of it have been long in print, I shall spare myself the trouble of transcribing it.

Many passages which occur in these pages are indeed inserted in the print, but not in the order in which they are in the transcript ; particularly that touching the deposal and pretended resignation of *Edward II*, the most exceptionable part of the whole work. But far the greatest part of them are totally omitted.

I forbear to enter farther into a minute and critical inquiry touching the authenticity of these pages, because I am not willing to revive a question which hath long lain asleep ; and which, through a happy change of times and circumstances, is now become a matter of no sort of importance to the publick ; namely, what were the author's *private* sentiments touching certain political questions which never were, nor in the nature of things ever can be, the subject of litigation in *Westminster-Hall*.

The other passage which I have excepted is near the beginning of the second volume of the transcript, and mentions shortly divers reasons in support of the opinion of the majority of the judges in the case of *Messenger* and others, who were indicted of high treason for pulling down

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down bawdy-houses in the time of *Charles II.* This passage, though it appears in the author's hand-writing and is copied by the transcriber, is likewise omitted.

Before I conclude this advertisement I gladly embrace the opportunity it affords me of doing some justice to the memory of the learned author. I have at the bottom of page 397 observed, that some words placed between hooks in the report of Sir *Ralph Grey's* case from the year-book are omitted by him. They are omitted in the print and likewise in the transcript: but I am satisfied, that this omission was not wilfully made or with the least intention to mislead the reader. The author's known character sufficiently secures him against any imputation of that kind. But there is another circumstance which strongly inclines me to think, that the omission was owing to mere inadvertency in the hurry of composing or transcribing; for in a loose sheet, found among the author's papers, undoubtedly of his hand-writing, copies whereof are in many hands, the case of Sir *Ralph Grey* is cited, and the whole passage as it stands in the year-book is faithfully transcribed. Mistakes and omissions of this kind the best of authors, especially in long works, are sometimes subject to, and common candour obligeth us to impute them to the true cause.

---

*Non ego paucis  
Offendar maculis, quas aut incuria fudit,  
Aut humana parum cavit natura.*

---

N. B. *The original MS. with the Transcripts  
in 7 volumes will, for the satisfaction of the curi-  
ous, be lodged in the British Museum for a few  
months.*



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